

Determination 2007/79

Safety barriers for a swimming pool at 17 Cooper Crescent, Cambridge

1. The matters for determination

- 1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicant is the Kirkbride Family Trust (“the owner”) and the only other party is the Waipa District Council (“the territorial authority”).
- 1.2 The application arises from the territorial authority’s refusal to amend a building consent in respect of a swimming pool (“the pool”) and its associated safety barriers.
- 1.3 For the reasons set out below, I take the view that the matters for determination are:
 - (a) Whether the pool and its associated safety barriers
 - (i) as specified in the building consent, or
 - (ii) as specified in the proposed amendmentcomply with clause F4 of the Building Code (the First Schedule to the Building Regulations 1992).
 - (b) The territorial authority’s decisions:
 - (i) to issue the building consent, and
 - (ii) to refuse to issue the proposed amendment to the building consent.
- 1.4 In making my decision I have not considered any other aspects of the Act or of the Building Code.

1.5 In this determination unless otherwise stated, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code.

2. The safety barriers

2.1 The relevant parts of the house and the swimming pool as specified in the building consent are shown in Figure 1 and as specified in the proposed amendment in Figure 2.

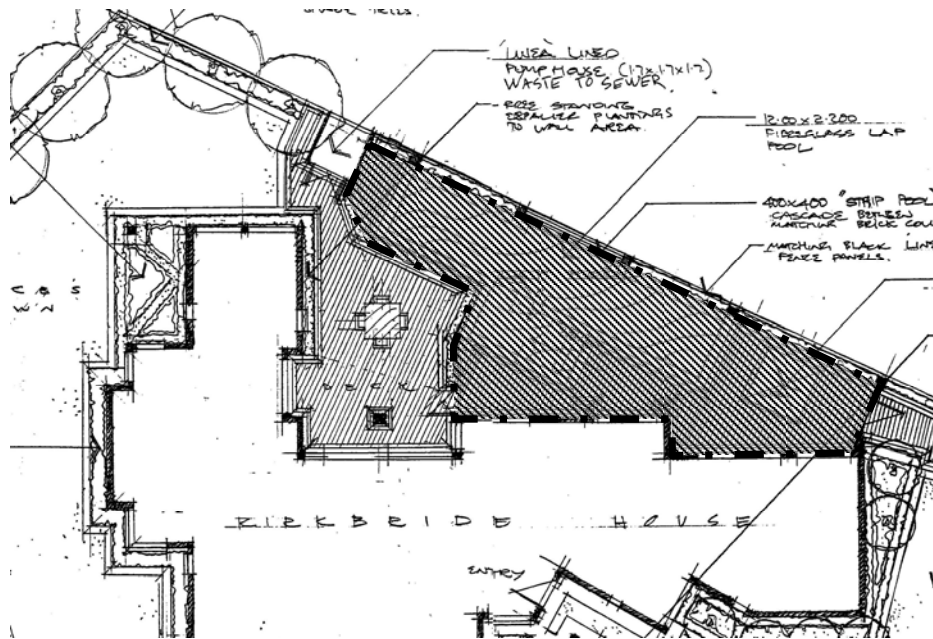


Figure1: The swimming pool as specified in the building consent

Area of pool enclosure - 

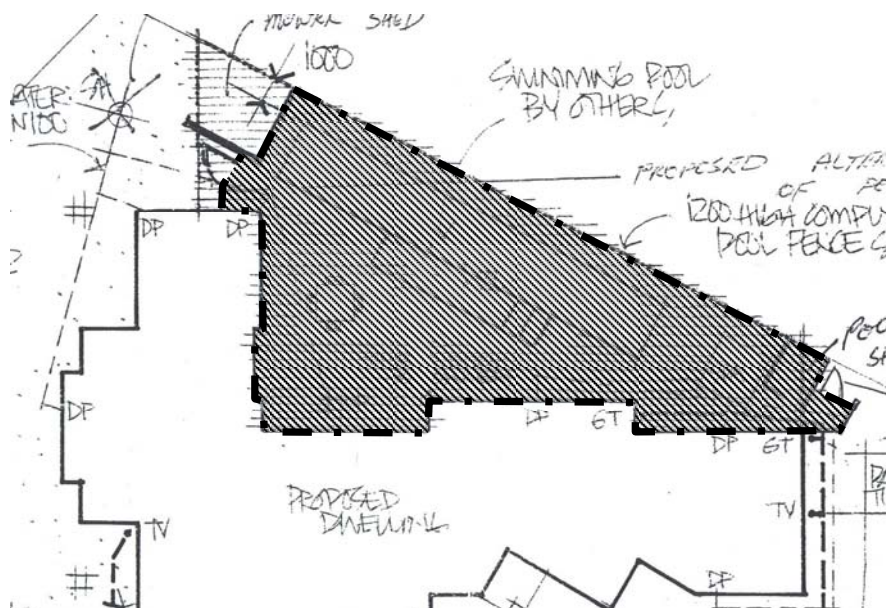


Figure 2 The swimming pool as specified in the proposed amendment

- 2.2 In each case, the pool is enclosed by the external walls of the house plus standard swimming pool fencing and gates. The amendment would result in an increase in:
- (a) an increase in the fenced-in area.
 - (b) additional access to that area through:
 - (i) sliding doors in the external wall of the house.
 - (ii) a new gate at the western end of the area.
 - (c) the inclusion within that area of a new pool shed.

3. Correspondence between the parties, their submissions, and the draft determination

3.1 The parties discussed the proposed pool at meetings and in correspondence. They also made written submissions to me in the course of this determination.

3.2 Writing to the territorial authority in support of the proposed amendment to the building consent, the owner said:

... The proposed amended fence line will not of any significance decrease the protection to the safety of young children, nor will it significantly increase the danger to the safety of young children.

... the main thoroughfare to the children's play area is [not] through the immediate swimming pool area [but] from the house through to the garage ... [and then] to the play area. The reason for this established pathway that the children take, is because most of their sporting equipment is stored in the garage.

... I am aware that the adjusted fence line will then envelope an area used for entertaining, barbequing, sunbathing, and the placing of pool furniture.

However, ... the ... case of *Waitakere City Council v Hickman*¹ ... states:

"... if the pool owner is able to demonstrate that barbeques or entertaining take place in the area surrounding the pool from time to time in conjunction with the use of the pool as described, then the area so used may be included within the immediate pool area."

The area to be enclosed by the amended fence line is very limited and is our only out door entertainment area. Whilst entertaining ... may not always occur exclusively in conjunction with the use of the pool, [the case states]:

"Activities in conjunction with the use of the pool need not occur exclusively in conjunction with such use and are not to be excluded from the immediate pool area merely because they are capable of occurring independently of the use of the pool."

3.3 The territorial authority, refusing the owner's application for the amendment, referred to Determinations 2005/124 and 2005/125 and said:

You state ... that the area you propose to fence off as the immediate pool area is your only outdoor entertainment area.

¹ *Waitakere City Council v Hickman* 1/10/2004, Randerson J, HC Auckland CIV 2003-404-7266.

Whilst it is possible that the barbecue and/or entertaining may take place within the immediate pool area, and from time to time may not be associated with the use of the pool, I do not accept your only outdoor entertainment area being located within the immediate pool area.

There will be four sets of sliding/folding doors opening into the proposed pool area that will clearly be left open for ventilation purposes from time to time giving free and unrestricted access to the pool. This will increase the risk to young children.

3.4 In its application for a determination, the owner said:

. . . Determination 2005/124 . . . is distinguished for two reasons. The first . . . is that the immediate pool area remains with very little open space – it is a rather small area, inadequate for children to play in, with just enough room for a run and jump in to the pool. The area that the children do play in, is to the west of the house and is not included in the immediate pool area.

The second difference is that the immediate pool area remains flat, with no ground sloping downwards, and therefore the topography is such that a person in the surrounding area will be aware of the presence of a young child should they be in danger.

With regard to Determination 2005/125 I am willing to ensure that the doors opening into the immediate pool area comply with the building code. . . .

With regard to the issue of ventilation . . . electronically operated [windows have been provided] for optimum ventilation. I therefore disagree that the sliding/folding doors “will clearly be left open for ventilation purposes”.

3.5 In its submissions to me, the territorial authority repeated its concerns that the fenced area would be used as a route to other parts of the allotment and, as the only area for outdoor entertaining, “will most often be used for activities and entertainment that is not in conjunction with the pool and therefore should be excluded from the immediate pool area”. The territorial authority also said:

. . . since the Building Consent was issued, Determination 2006/103 has been released and it would now appear that sliding/folding doors without some additional features such as signs, a beam alarm or pool cover will not comply with F4. . . .

It should also be noted that NZS 8500:2006 Safety Barriers and Fences Around Swimming Pools, Spas and Hot Tubs [“NZS 8500”], is no longer a draft standard. Although not cited in F4 as a compliance document, this standard must now carry a lot more weight as a guidance document than when Determination 2006/103 was issued.

3.6 The territorial authority also referred to the Fencing of Swimming Pools Act, recognising that questions under that Act are outside my jurisdiction but saying:

It would appear from [guidelines on the Fencing of Swimming Pools Act issued by the Department of Internal Affairs] that any decision made by a Territorial Authority under Clause 11 of the Schedule to that Act regarding the non-compliance of doors is in fact an exemption that can only be made by Council

This now raises the issue of whether or not any alternative solution to the acceptable solution F4/AS1, (that being the Schedule to the Fencing of Swimming Pools Act) . . . meets the requirements of the Fencing of Swimming Pools Act, Schedule Clauses 8-10. If not, it would appear that even though a Building Consent Authority may have approved an alternative solution and issued a Building Consent, an exemption from Council under the Fencing of Swimming Pools Act may still be required.

3.7 I prepared a draft determination and sent it to the parties for comment. The draft was to the effect that:

- (a) The use of the fenced area for outdoor entertaining is acceptable; but
- (b) The new gate at the western end of the pool is not; and
- (c) The means whereby, in the owner's words "the [sliding-folding] doors opening into the immediate pool area comply with the building code" had not been specified in the proposed amendment.

3.8 The territorial authority accepted the draft.

3.9 The owner accepted the draft subject to what were described as "non-contentious amendments" but amounted to details of how the owner proposed to "ensure that the [sliding-folding doors] comply with the building code" (see 3.4 above and 7.1.2 below). I have not taken those proposals into account because they were not included in the matters for determination and will need to be considered by the territorial authority in the context of a new building consent for the pool. However, because the proposals were expressed in terms of clause 11 of the Schedule to the Fencing of Swimming Pools Act I have added some comments on that clause and the other provisions of the Fencing of Swimming Pools Act and of the Act that relate to waivers or modifications of the Building Code.

4. The legislation, the acceptable solution, and NZS 8500

4.1 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. (g) Restrict the passage of children under 6 years of age when provided to guard a change of level in areas likely to be frequented by them.	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	

4.2 The acceptable solution F4/AS1 says:

“3.1 Fencing for swimming pools shall be constructed to no lesser standard than is required by the Fencing of Swimming Pools Act 1987, to restrict the access of children.”

4.3 Relevant provision of the Fencing of Swimming Pools Act are:

(a) 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

(b) Section 8(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 2004 in respect of swimming pools subject to this Act at all times when this Act applies in respect of the pool.

(c) Section 13B provides in effect that fencing in accordance with the Schedule to the Fencing of Swimming Pools Act shall be deemed to comply with the Building Code.

(d) Clauses 8 to 11 of the Schedule say:

8. Every gate or door shall be . . . so mounted that—

(a) It cannot open inwards towards the immediate pool area . . .

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.

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.

4.4 Relevant provisions of NZS 8500 are:

IMMEDIATE POOL AREA. 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. . . .

2.3.2 Specific requirements for pools

For new . . . pools at least one of the following requirements shall be met:

- (f) The pool shall be enclosed by an isolation barrier where a wall of a house contains doors opening from the house to the immediate pool area (regardless of direction of door swing). Should the doors not be self-closing and self-latching, then a lockable door latch 1500 mm above finished floor level shall be provided on every opening door-set. In addition there shall also be:
 - (i) An automatic pool cover that complies with ASTM F1346-91², and
 - (ii) An alarm complying with UL 2017³ capable of detecting unauthorised access from the house into the immediate pool area, and that when activated emits a sound of 85 decibels or more to be heard from the house.

5. The issues

5.1 I take the view that the issues arising in this determination are:

- (a) Whether the fenced-in area specified in the amendment to the building consent can properly be described as “the immediate pool area”, clause F4.3.4(f) and the Fencing of Swimming Pools Act, or “the immediate pool surround”, clause F4.3.5(a). That issue is discussed in 6 below.
- (b) Whether the sliding-folding doors from the house to the fenced area comply with clause F4.3.4. That issue is discussed in 7 below.
- (c) Relationship between the Building Code and the Fencing of Swimming Pools Act. That issue is discussed in 8 below.

6. The fenced-in area

6.1 The Building Code refers to both “the immediate pool area”, in clause F4.3.4(f), and “the immediate pool surround”, in clause F4.3.5(a), but does not give definitions of those terms.

6.2 In Determination 2003/6, the then Building Industry Authority took the view that:

... 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.

² American Society for Testing and Materials Standard F1369-91 (2003) *Standard performance specification for safety covers and labelling requirements for all covers to swimming pools, spas, and hot tubs.*

³ provisions that would restrict the access of children given that the doors were not self-closing and self-latching.

... 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.

6.3 I have adopted the same approach in subsequent determinations. Applying that approach to this case, I consider that:

- (a) An adult who is in the fenced area in the course of “outdoor entertaining” will be aware of the presence of any children and able to protect them; but
- (b) The new gate proposed for the western end of the pool means that people will use the area as a route from the house to the garden, and an adult using that route will not necessarily be aware of the presence of children.

Accordingly, I conclude that the fenced area as proposed under the amendment cannot properly be called “the immediate pool surround”.

6.4 The Fencing of Swimming Pools Act refers to “the immediate pool area”, which is defined in section 2 of that Act as meaning “the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried out in conjunction with the use of the pool”. That term was considered in the *Hickman* case, which was heard after Determination 2003/6 was issued.

6.5 I accept that “outdoor entertaining” will take place in the area, sometimes in conjunction with the use of the pool and sometimes not. I agree with the owner, see paragraph 3.2 above, that *Hickman* establishes that such activities “are not to be excluded from the immediate pool area merely because they are capable of occurring independently of the use of the pool”. I do not agree with the territorial authority, see paragraph 3.5 above, that the matter should be decided on the basis of whether or not the area “will most often be used for activities and entertainment that is not in conjunction with the pool” (my emphasis).

6.6 However, the new gate at the western end of the area indicates that people will use the area as a route from the house to the garden. I take no account of the owner’s contrary statement as to the route used by the children currently living in the house because there is no way of knowing what route would be taken by future occupants. Using the area as a route of travel is an activity not in conjunction with the pool. In the light of the *Hickman* decision, I therefore conclude that the fenced area cannot properly be called “the immediate pool area”.

7. The sliding-folding doors

7.1.1 As to whether the sliding-folding doors from the house to the fenced area (“the doors”) comply with the Building Code, I take the view⁴ that:

- (a) The doors come within the exemption of clause F4.3.5(a) and are therefore not required to be self-closing and self-latching.

⁴ See Determination 2006/103 for a more extended discussion of this point.

- (b) Nevertheless, the doors are required to comply with clause F4.3.4(f) and “restrict the access of children under 6”.

- 7.1.2 The owner said that it was “willing to ensure that”, see 3.4 above. However, the owner did not specify how that was to be achieved. Specifically, the owner did not identify, as part of the plans and specifications for the proposed amendment to the building consent, provisions that would restrict the access of children given that the doors were not self-closing and self-latching. As mentioned in paragraph 3.9 above, this determination can take no account of the owner’s subsequent proposals in that respect.
- 7.1.3 In the absence of any such provisions, I conclude that the doors do not comply with the Building Code.
- 7.1.4 That applies also to the sliding-folding doors specified under the current building consent.

8. The Fencing of Swimming Pools Act

8.1 General

- 8.1.1 The territorial authority raised the question of the relationship between the Act and the Building Code on the one hand and the Fencing of Swimming Pools Act on the other, see 3.6 above.
- 8.1.2 I have no jurisdiction under the Fencing of Swimming Pools Act, but I note that it does not specifically require that fencing (including gates and doors) must comply with its Schedule. What it does require is that fencing must comply with the Building Code, see its section 8(1), subject to any exemption granted under its section 6. It also provides in effect that fencing complying with its Schedule is deemed to comply with the Building Code. Exemptions granted under its section 6 are exemptions “from some or all of the requirements of this Act”.
- 8.1.3 The Building Code comes under the Building Act, in which sections 22 and 23 provide in effect that building work complying with a compliance document must be accepted as complying with the relevant provision of the Building Code, but that is not the only means of establishing compliance.
- 8.1.4 Accordingly, if fencing complies with the Building Code, then it complies with the requirements of the Fencing of Swimming Pools Act even if it does not comply with the Schedule to that Act and there is no need for an exemption under its section 6.
- 8.1.5 I repeat that I have no jurisdiction under the Fencing of Swimming Pools Act so that the above remarks are not binding on the parties or anyone else.

8.2 Waivers and modifications

- 8.2.1 Under the Act, a territorial authority has the power to grant waivers or modifications of the Building Code, see section 67. I take the view that the grant of any such waiver or modification must be reasonable taking account of the circumstances of the particular case.
- 8.2.2 The Fencing of Swimming Pools Act provides that a territorial authority has:
- (a) A general power of exemption under section 6, provided that such an exemption “would not significantly increase danger to young children”. Such an exemption must be approved by resolution of the territorial authority. There has been no suggestion of any such exemption in this case.
 - (b) A specific power of exemption, under clause 11 of the Schedule, in respect of the requirements of clauses 8 to 10 to the effect that doors must open outwards from the pool and be self-closing and self-latching, provided that compliance with those requirements “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”.
- 8.2.3 I take the view that an exemption or waiver under section 6 of, or under clause 11 of the schedule to, the Fencing of Swimming Pools Act also amounts in practice to a waiver or modification of the Building Code and is required to be reasonable taking account of the circumstances of the particular case.
- 8.2.4 As mentioned in 3.9 above, the owner made certain proposals in respect of the sliding-folding doors in terms of clause 11 of the Schedule to the Fencing of Swimming Pools Act. I have not considered those proposals for the reasons set out in 10.1 below. However, I observe that if and when the territorial authority considers those proposals it will need to take account of “whether the proposals would not significantly increase danger to young children”. In assessing what degree of additional danger is “significant”, the territorial authority might well compare the owner’s proposals with clause 2.3.2(f) of NZS 8500, which addresses the same situation and requires an automatic pool cover plus door alarms.

9. Conclusions

- 9.1 For the reasons set out above I conclude that the proposed amendment to the building consent does not comply with the Building Code. I must therefore confirm the territorial authority’s decision to refuse to issue the amendment.
- 9.2 However, as mentioned in 7.1.4 above, the building consent itself does not specify any provisions that would restrict the access of children given that the doors are not self-closing and self-latching. Accordingly, I must reverse the territorial authority’s decision to issue the building consent without such provisions.

10. What is to be done?

10.1 It is not for me to say how the pool is to be brought to compliance with the Building Code. That is for the owner to propose and for the territorial authority to accept or reject. In particular, the parties will need to agree on means for restricting the access of children given that the doors were not self-closing and self-latching.

10.2 One such means is specified in NZS 8500, see 4.4 above. NZS 8500 was approved by the Standards Council on 3 November 2006 to be a New Zealand Standard under the Standards Act 1988. As such, NZS 8500 must command respect as representing the consensus of the major national bodies concerned arrived at after a process of public consultation. In that respect, this determination is different from Determination 2006/103, in which, referring to what is now NZS 8500, I said:

5.4.7 The territorial authority's requirements quoted above are significantly less onerous than those of the draft Standard, particularly as regards the cover and the alarm. However, a draft is only a draft, and I am reluctant to treat it as if it were a compliance document.

5.4.8 In any event, the adequacy of the territorial authority's requirements is not a matter submitted for determination. Those matters are whether door D104 complies with clause F4 and consequently whether the building certifier's decision to issue the code compliance certificate is to be confirmed, reversed, or modified.

I emphasise that in Determination 2006/103, although I said that the territorial authority's "less onerous" requirements seemed sensible subject to certain reservations, I did not make any decision as to those requirements so that Determination 2006/103 must not be taken to imply any approval of them.

10.3 However, although NZS 8500 has now been finalised it has no mandatory effect unless and until it is incorporated by reference into some other document that does have such an effect. For the purposes of this determination, the relevant document would be the compliance document for clause F4, and particularly the acceptable solution F4/AS1⁵. The procedures specified in section 29 and which must be followed before NZS 8500 can be cited in F4/AS1 have been commenced but not completed, so that NZS 8500 does not have the legal status of a compliance document.

10.4 That does not mean that a building consent authority cannot accept compliance with NZS 8500 as amounting to an "alternative solution", being a solution that complies with the Building Code but not with a compliance document.

10.5 If the owner does decide to apply for a new building consent incorporating the relevant provisions of NZS 8500, then it will need to ensure that the plans and specifications accompanying the application establish that the particular pool cover

⁵ A compliance document is mandatory only in the sense that a building consent authority must accept compliance with a compliance document as establishing compliance with the provisions of the Building Code to which the document relates, but it is not the only means of complying, see section 23.

and the particular alarm proposed to be used comply with ASTM F1346-91 and UL 2017 respectively.

- 10.6 In that connection, I draw attention to the following passage from 4.5 of Determination 2007/3:

Normally, I would expect that any supplier purporting to be testing a building material to a Standard would have its test procedures verified by an independent testing authority.

I consider that approach applies in this case also, especially as the products concerned are not widely used in New Zealand.

- 10.7 I emphasize that the above remarks must not be taken to mean that NZS 8500 is an acceptable solution for clause F4. That cannot be the case unless and until F4/AS1 is formally amended in accordance with section 29. However, it is one thing for the Chief Executive to determine that NZS 8500 is an acceptable solution and quite another for an individual building consent authority to accept it as an alternative solution.

11. Decision

- 11.1 In accordance with section 188 of the Act, I hereby:

- (a) determine that the swimming pool and its associated safety barriers, both as specified in the building consent and as specified in the proposed amendment, do not comply with clause F4, and
- (b) reverse the territorial authority's decision to issue the building consent but
- (c) confirm its decision to refuse to issue the proposed amendment.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 20 July 2007.

John Gardiner
Manager Determinations
