



Determination 2010/119

The use of a cover as a barrier to a swimming pool at 470 Kaipara Flats Road, Warkworth

1. The matters to be determined

- 1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ 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.
- 1.2 The parties to this determination are:
- the owner of the pool and adjacent house, Mr N Houston (“the applicant”)
 - the Rodney District Council (“the authority”) carrying out its duties and functions as a territorial authority and a building consent authority.
- 1.3 The dispute between the parties relates to the authority’s decision to refuse to issue a code compliance certificate for a swimming pool constructed on the applicants’ property. The reason given by the authority for this decision was because the fencing around the swimming pool had not been installed as set out in the building consent, and instead the pool had been fitted with a pool cover instead.
- 1.4 Therefore, I take the view that the matter for determination² is whether the swimming pool cover (as described in paragraph 2.3) complies with Clause F4 of the Building Code (Schedule 1 of the Building Regulations 1992).

¹ The Building Act 2004, Building Code, compliance documents, past determinations and guidance documents issued by the Department are all available at www.dbh.govt.nz or by contacting the Department on 0800 242 243

² In terms of sections 177(1)(a) of the Building Act 2004

- 1.5 In this determination, I will refer to the following legislation and standards, the relevant parts of which are set out in Appendix A.
- The Building Act 2004 (“the Act”) with its sections referred to as sections of the Act.
 - The Fencing of Swimming Pools Act 1987 (“the FOSP Act”), with its sections referred to as sections of the FOSP Act.
 - Clause F4 Safety from Falling of the Building Code, referred to as Clause F4.
 - NZS 8500:2006 Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs.
- 1.6 In making my decision, I have also considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the Act or of the Building Code.

2. The pool barriers

- 2.1 The property has a swimming pool constructed adjacent to the north-western side of the house. The pool is sunk into the ground and is rectangular in shape. It ranges from 1100mm to 1900mm in depth.
- 2.2 The pool is surrounded by wooden decking, which is also at or slightly above ground-level. It is not clear from the information I have received whether this decking extends all the way to the house.
- 2.3 At present the pool does not have any fences around it but is fitted with a fully automated hydraulic lockable pool cover (“the pool cover”). According to the manufacturer’s information supplied by the applicant, the pool cover complies fully with American standard ASTM F1346-91³, which is the standard cited in NZS 8500 for pool covers.

3. Background

- 3.1 The authority issued a building consent (number ABA-1002177) for the swimming pool and swimming pool fencing on 2 November 2007. The plans that accompanied the consent show the proposed pool was to be surrounded by a 1200mm high pool fence. The fence completely separated the pool and immediate pool area from the house and access to the immediate pool area was through an outward opening gate. Proposed decking running between the pool and the house did not form part of the consent.
- 3.2 In his application for a determination, the applicant stated that the pool was constructed in 2007.
- 3.3 The fencing shown in the building consent was not constructed and the applicant had the swimming pool fitted with an automated hydraulic pool cover. The cover can be locked with a key when the pool is not in use. The applicant did not apply for an amendment to the building consent in order to use this barrier as an alternative to the consented fencing, nor did he apply for an exemption under the FOSP Act.

³ ATSM F1346-91 (2003) ‘Standard performance specification for safety covers and labeling requirements for all covers for swimming pools, spas and hot tubs’.

3.4 The applicant applied for a code compliance certificate for the pool and pool barrier. I have not seen a copy of that application.

3.5 On 21 December 2009, the authority wrote to the applicant declining his application for a code compliance certificate on the grounds that there were 'non-complying issues'. The authority listed the following matters as requiring to be completed:

- the pool fencing had to be completed as consented
- all doors leading to the pool area had to be self-closing and self-latching, and windows lower than 760mm to the ground had to be restricted from opening further than 100mm
- the applicant would have to apply to the Department for a determination about the 'use of a cover instead of a fence for a swimming pool'.

The authority also stated that it required a producer statement for the installation of the pool.

3.6 The Department received an application for a determination on 11 January 2010. The Department requested further information. Due to delays in supplying this, the application for a determination was not accepted until 20 August 2010.

4. The submissions

4.1 In the application for determination, the applicant stated that he considered the pool cover to be an 'alternative solution' and that 'instead of pool fencing the pool has a hydraulic lockable cover that can only be opened with a key (child and adult proof)' and the cover 'exceeds ASTM F1346-91 standards'.

4.2 The applicant supplied copies of:

- photos of the pool, its cover, and the hydraulic mechanism and locks for the cover
- manufacturer's information about the pool cover.

4.3 In an email to the Department dated 3 August 2010, the applicant confirmed that he had applied for the determination at the suggestion of the authority, and that this was on the basis that 'a fully lockable cover that cannot be penetrated by anybody including adults' was an alternative to having pool fencing, and that 'we have found this to be a far safer option than a pool fence as our children could quite easily climb over one of these'.

4.4 The authority made a submission dated 13 January 2010. In this the authority accepted that its suggestion to the applicant to apply for a determination had been made in error. The authority noted that the current building consent was for a fully fenced swimming pool and that it had not received any application to amend the building consent to allow the pool cover to be used instead of the fence. As a result, it had not 'made any decision in respect of this issue'. However, the authority also noted that 'it is unlikely that [it] would grant such an amendment given [its] policy and interpretation of the Building Code'. The authority also submitted that the application for a determination was deficient in that it did not address either 'the fencing of the property or the immediate pool area' or 'compliance with [NZS 8500]. The authority stated that it 'has a policy of issuing exemptions from the fencing of swimming pool requirements' based on this standard.

- 4.5 The authority recommended that the application for a determination should either:
- be returned, because the applicant had not made out a case why the pool cover should be accepted as an alternative solution to the requirements of Clause F4, and was not challenging or disputing a decision of the authority
 - be declined, ‘as the pool cover on its own is incapable of meeting the requirements of Clause F4 of the Building Code’.
- 4.6 The authority supplied copies of:
- correspondence between itself and the applicant
 - a newspaper article about spa pool covers.
- 4.7 In respect of the points raised by the authority about the validity of the application for determination (refer to paragraph 4.5), I note that section 177(a) of the Act (now 177(1)(a)) gives the Chief Executive power to make a determination about ‘whether particular matters comply with the Building Code’, whether or not an authority has also made a decision about them.
- 4.8 A draft determination was issued to the parties on 22 October 2010 for comment.
- 4.9 The authority accepted the draft determination without comment.
- 4.10 The applicant did not accept the draft determination and in a response dated 1 December 2010, noted:
- ... the following layers of safety [can be implemented]:
 - [we will] keep the pool key in a secure place locked in office filing cabinet...
 - [we will] and keep the key in an envelope that has a warning message on the outside ...
 - [we will] have another warning sign installed next to key switch ... and a sandwich board in the vicinity of the pool stairs
 - [we will] not let anybody use the key unless they have been fully inducted
 - [we will] have a spotter will when closing the pool ...
 - [we will] never leave the pool unless getting out ...
 - with regards to future owners, we realise that this strict policy on pool safety could well be a lot different to someone else’s [therefore], we propose that if we were ever to sell the property, we would install a pool fence, approved by the authority, before placing the property on the market.

5. Matter 1: The barrier to the swimming pool

Discussion

- 5.1 The matter for consideration is whether the hydraulic lockable pool cover that is currently installed on the pool complies with Building Code Clause F4 as an alternative solution. The Building Code is a performance-based code and any alternative solution to it must comply with, or exceed, the performance requirements set out in its various clauses.
- 5.2 Clause F4.3.3 states that ‘Swimming pools having a depth of water exceeding 400mm, shall have barriers provided.’ The Department (and its predecessor, the Building Industry Authority) have considered the issue of what constitutes a barrier for the purposes of Clause F4 in previous determinations (namely Determinations 2001/2 and 2007/87) and I accept the reasoning in those determinations. In particular, I agree with the finding in Determination 2007/87 that a lockable swimming pool cover, when it is in place, can be regarded as a safety barrier for the purposes of restricting the access of children to a swimming pool, as required by Clause F4.3.3. However, when the pool cover is removed so that people can use the pool, this requirement is no longer met.
- 5.3 I read the requirement in Clause F4.3.4(a) that a barrier should be continuous as meaning that a safety barrier must (among other things) remain in place. Because the cover does not remain in place and is not self-closing and self-latching, I conclude that the cover does not comply with Clauses F4.3.4(a) and F4.3.5(a). People must be able to pass through such a safety barrier to use the pool, and with a fence-type barrier they would pass through gates or doors, which are required by Clause F4.3.5(a) to automatically close and latch. The opening and leaving open of the pool cover, however, would mean a breach of the pool barrier. Although I acknowledge that the pool cover is fitted with locks, and the intention of the applicant in installing the pool cover was to ensure high safety standards, the effectiveness of the pool cover is reliant on the behaviour of people using the pool.
- 5.4 I also acknowledge the owner has gone to some lengths to articulate additional policies about how the swimming pool and pool cover would be operated. While I recognise these policies have the objective of improving safety, this of itself cannot change my view that the effectiveness of the pool cover, and the owner’s policy to manage safety are reliant on people’s behaviour.
- 5.5 This behaviour is a management practice as it is reliant on the behaviour of the people using the pool. In Determination 92.1102 made under the Building Act 1991, the then Building Industry Authority said, ‘The Building Act does not cover the management of buildings in that respect, and assurances as to future management practices will rarely be enforceable under the Act.’ In Determination 2006/22, I took the view that I must take account of how both present and future owners of the house will use the space.

Conclusion

- 5.6 For the reasons set out above I conclude that the swimming pool cover does not comply with Clause F4 of the Building Code.

6. What is to be done now?

- 6.1 In order to obtain a code compliance certificate the applicant must either construct the fencing as per the consent documents, or develop an alternative proposal for the provision of barriers to the pool that will comply with the Building Code and apply for an amendment to the building consent.
- 6.2 If the applicant chooses to develop an alternative proposal, the applicant may find it useful to look at the safety measures set out in NZS 8500. As discussed in Determination 2007/79, until NZS 8500 is cited in the compliance document for Clause F4, it does not have the legal status of a compliance document. However NZS 8500 was approved by the Standards Council on 3 November 2006 to be a New Zealand Standard and as such must command respect as representing the consensus of the major national bodies represented, arrived at after a process of public consultation. The authority may well compare any solutions proposed by the applicants with those offered in NZS 8500.
- 6.3 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 of the Building Act. I note the authority has stated it has a policy of issuing exemptions from the FOSP Act requirements based on compliance with NZS 8500, thus treating NZS 8500 as an alternative solution.

7. The decision

- 7.1 In accordance with section 188 of the Act, I hereby determine that the swimming pool cover does not comply with Clause F4 of the Building Code.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 3 December 2010.

John Gardiner
Manager Determinations