



## Determination 2015/037

# Regarding the compliance of pool barriers for a swimming pool at 99 Root Street East, Fielding

### 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the *Building Act 2004*<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations and Assurance, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The parties to this determination are:
- the owners of the house and pool, K and S Lanceley, (“the applicants”), acting through a licensed building practitioner as their agent (“the agent”)
  - Manawatu District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This dispute relates to the authority’s decision to refuse to grant building consent for a proposed swimming pool and its barriers. The authority’s refusal is on the grounds that the barriers, which include two sliding doors, do not comply with Clause F4 – Safety from falling of the Building Code<sup>2</sup> (First Schedule, Building Regulations 1992).
- 1.4 I therefore take the view that the matters for determination<sup>3</sup> are whether the proposed pool barrier complies with Clause F4 of the Building Code (First Schedule, Building Regulations 1992), and whether the authority was correct in its decision to refuse to grant the building consent.
- 1.5 In this determination, I will refer to the following legislation and New Zealand Standard, the relevant parts of which are set out in Appendix A.
- The *Building Act 2004* with its sections referred to as sections of the Act.
  - Building Code Clause F4 – Safety from falling.
  - The *Fencing of Swimming Pools Act 1987* (“the FOSP Act”), with its sections referred to as sections of the FOSP Act.
  - The Schedule to the FOSP Act (“the Schedule”), with its clauses referred to as clauses of the Schedule.
  - New Zealand Standard NZS 8500:2006 Safety Barriers and fences around swimming pools, spas and hot tubs (“NZS 8500”).

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

<sup>2</sup> 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.

<sup>3</sup> Under section 177(1)(a), 177(1)(b) and 177(2)(a) of the Act

- 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 proposed swimming pool and pool barrier

- 2.1 The applicants are proposing to build a new swimming pool and pool barrier at their residential property. The proposed pool is rectangular in design, measuring 8.4m x 4.2m. It sits within a rectangular pool area, fenced on three sides by a metal pool fence that has two self-closing, self-latching pool gates set within it.
- 2.2 The fourth side of the proposed pool barrier is formed by part of the northern wall of the house. It is the compliance of this side of the barrier that is in dispute. Set within the wall are two sliding doors and three windows. The doors give direct access from two separate rooms into the immediate pool area. One door has one sliding panel; the other, which is larger, two sliding panels.

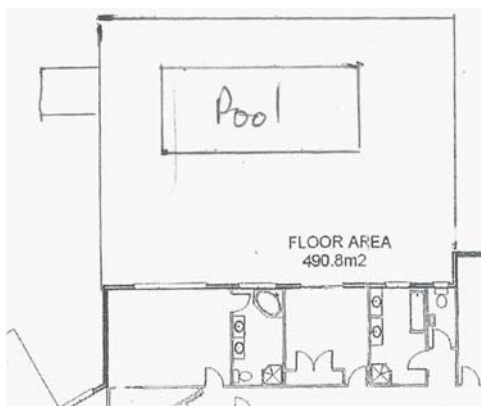


Figure 1: Site plan showing proposed pool and pool barrier, and existing house

- 2.3 In their application for a building consent the applicants have stipulated that all of the windows in the northern wall will be fitted with security latches to prevent them being opened. The doors will both be fitted with patio locks or deadbolts, which will be located at 1.5m above floor height and be key lockable.

## 3. The background

- 3.1 The applicants applied for a building consent on 9 September 2014 to build the proposed swimming pool and barrier.
- 3.2 On 26 September 2014, the authority advised the applicants that it was suspending the application while it sought further information. The information sought related to the construction of the pool fence, and the use of the lockable bolts on the sliding doors. The authority asked the applicants to 'reassess the use' of these locks, and 'provide an alternative locking device' that would make the doors comply with the FOSP Act.
- 3.3 There followed discussion between the parties and a meeting where options were discussed, including the possibility of using self-closing mechanisms on the sliding doors.

- 3.4 On 31 October 2014, the agent wrote to the authority setting out the applicants' view that fixing a deadbolt 1500mm above the ground on the inside of the door, does comply with Clause F4 of the Building Code. The grounds given were that:
- the bolts would prevent the doors being opened except by an adult
  - there was alternative access to the pool area through the gates in the pool fence
  - no children under 6 years of age have access to the bedrooms that the doors lead off.
- 3.5 On 12 November 2014, the agent sent the authority another letter repeating the applicants' position that the two sliding doors with lockable bolts did comply with Clause F4. The agent noted the exclusion in Clause F4.3.5(a), which means that 'sliding and sliding-folding doors that give access to the immediate pool surround from a building that forms part of the barrier' do not have to be constructed so that they automatically close and latch. The agent then gave further reasons why the proposed doors complied with Clause 4, including that: 'The dead bolt fitted 1500mm above the door, would mean that person must be big enough to open the door, therefore be capable of protecting the child against the risk of falling into the pool.'
- 3.6 On 19 November the authority emailed the agent advising that it was unable to accept the proposed lockable bolts 'as a means of complying with the [FOSP Act]'. The reason given was that it was reasonable to require the doors to be fitted with automatic door closers. The authority also indicated in this letter that it did not think there was much point in the applicants applying for an exemption under Section 6 of the FOSP Act.
- 3.7 On 18 February 2015 the Ministry received an application for a determination.

#### **4. The submissions**

- 4.1 The determination was sought in respect of the authority's decision not to grant a building consent for the proposed pool and barrier, and not to allow an application for an exemption under Section 6 of the FOSP Act. (I note here that I have no jurisdiction under the FOSP Act.)
- 4.2 The applicants supplied copies of the correspondence between the parties, and of the plan showing the proposed pool and pool barrier, as submitted with the application for a building consent.
- 4.3 The authority did not make a submission in response to the application, but supplied from its files copies of the building consent documentation and correspondence between the parties.
- 4.4 A draft determination was issued to the parties for comment on 29 April 2015.
- 4.5 In a response received on 11 May 2015, the authority accepted the findings of the draft, noting that its refusal was on the basis of the consent application indicating the FOSP Act as the means of compliance for the pool fencing and that the authority considered it would be unlikely that the applicant would be successful in obtaining an exemption under section 6 of the FOSP Act.
- 4.6 In a response received on 1 June 2015, the applicant accepted the findings in the draft determination without further comment.

## 5. The relationship between the FOSP Act and the Building Code

- 5.1 I have no jurisdiction under the FOSP Act; however, it is helpful to look at the relationship between the FOSP Act and the Building Code.
- 5.2 I note that the FOSP Act does not specifically require that fencing (including gates and doors) must comply with its Schedule. What is required under section 8(1) of the FOSP Act is that fencing must comply with the Building Code, subject to any exemption granted under section 6 of the FOSP Act.
- 5.3 Section 6 gives authorities a general power to grant exemptions from ‘some or all of the requirements of [the FOSP] Act’, provided that such an exemption ‘would not significantly increase danger to young children’. Section 6(2) allows authorities to impose conditions on such exemptions.
- 5.4 Section 13B of the FOSP Act provides that its Schedule must be treated as a compliance document. Sections 22 and 23 of the Act provide that building work that complies with a compliance document must be accepted as complying with the relevant provision of the Building Code, although compliance documents are not the only means of establishing compliance.
- 5.5 Accordingly, if pool fencing complies with the Building Code, then it complies with the requirements of the FOSP Act, even if it does not comply with the Schedule. In such a case there would be no need for an exemption under section 6 of the FOSP Act.

## 6. Discussion: the compliance of the pool barriers

- 6.1 The applicants have applied for a determination about the authority’s decision not to grant a building consent for the proposed swimming pool and barrier. The reason given by the authority for this decision is that the sliding doors that form part of the proposed barrier do not comply with the FOSP Act. The applicants have also sought a determination about the authority’s indication that an application for an exemption under Section 6 of the FOSP Act would not be successful.
- 6.2 As stated in paragraph 5.1, I have no jurisdiction under the FOSP Act. In particular, I have no jurisdiction with respect of the authority’s advice about a Section 6 exemption.
- 6.3 What I do have jurisdiction to decide is whether the proposed barrier complies with the Building Code, and hence whether the authority’s decision not to grant a building consent was correct. As noted in paragraph 5.2, the FOSP Act specifically requires swimming pool fencing to comply with the Building Code. The schedule to the FOSP Act is one way of demonstrating this compliance, but it is not the only way.
- 6.4 In previous determinations I have considered the issue of whether sliding doors that give direct access from a house into the immediate pool area can be considered to comply with the Building Code. In particular, the issue was considered (among other issues) in Determination 2010/097<sup>4</sup>. In my opinion, the reasoning in that determination remains valid and applies to the current case.

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<sup>4</sup> Determination 2010/097 Safety barriers to a swimming pool and a spa pool at 17 Banks Road, Matamata (*Department of Building and Housing*) 22 October 2010

6.5 When considering whether the applicants' sliding doors comply with the Building Code, I note that:

- the sliding doors come within the exemption in Clause F4.3.5(a) and are therefore are not required to be self-closing and self-latching
- nevertheless, the sliding doors are still required to comply with Clause F4.3.4(f) and 'restrict the access of children under 6 years of age'
- the means of restricting access can include self-latching and self-closing mechanisms, but may also be achieved by other means.

6.6 In the current case, if the sliding doors from the house to the pool area were unlocked, and left unlocked or open there would be a breach of the pool barrier. Although I acknowledge that the applicants are proposing to fit the locks in such a way that they would be difficult for children to reach and operate, and intend to restrict access to the rooms adjacent to the immediate pool area by children, the effectiveness of the pool barrier will still rely on the behaviour of the people using the doors.

6.7 This constitutes a management practice. In Determination 1992/1102<sup>5</sup> (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.' This principle is now well-established and in Determination 2006/22<sup>6</sup>, I took the view that I must take account of how both present and future owners of the house will use the space.

6.8 While the applicants may fully intend to keep the sliding doors locked and closed, they cannot account for the behaviour of future owners, or indeed for guests or older children visiting the house. In particular, they cannot guarantee that anyone opening the door, even if they are an adult, would close and lock it again after use.

6.9 In addition the living areas in this case do not allow a direct view out to the immediate pool area, and nor is there any alarm system proposed; if the barrier was breached the occupants may be unaware for some time of a child in the immediate pool area.

## 6.10 Conclusion

6.10.1 For the reasons set out above I conclude that the barrier, which includes two sliding doors, does not comply with Clause F4 of the Building Code as it does not restrict the passage of children under the age of six into the immediate pool area.

6.10.2 Accordingly I consider the authority was correct not to grant the building consent, until such time as the barrier can be shown to be compliant.

## 7. What is to be done now?

7.1 The applicants will now need to suggest and the authority consider a design option that would enable the pool barrier to comply with Clause F4. The authority has suggested one possibility (a self-closing, self-locking mechanism for the doors) – this is not the only option and the exemption in Clause F4.3.5 makes clear that other solutions can be developed that will allow pool barriers containing sliding doors to achieve compliance.

<sup>5</sup> Determination No. 92.1102: Handrails for an Assembly Service Building (*Building Industry Authority*) 3 December 1992.

<sup>6</sup> Determination 2006/22 Swimming pool fences at 13 John Street, Ponsonby, Auckland (*Department of Building and Housing*) 22 March 2006.

- 7.2 In developing such a solution, the applicants may like to look at the guidance provided in NZS 8500. NZS 8500 was discussed in Determination 2007/79<sup>7</sup>, where it was established that until the standard is cited in the compliance document for Clause F4 it does not have the legal status of a compliance document. However, the New Zealand Standards Council has approved NZS 8500 as a New Zealand Standard and as such it must command respect as representing the consensus of the major national bodies represented, arrived at after a process of public consultation.
- 7.3 The authority may well compare any solutions proposed by the applicants with those offered in NZS 8500, and against the safety standards set by the Schedule to the FOSP Act as a compliance document. The above remarks must not be taken to mean that NZS 8500 is an Acceptable Solution for Clause F4.
- 7.4 While I note again that I have no jurisdiction under the FOSP Act, the parties might also like to consider afresh, once the applicants have put forward a solution that would compensate for the presence of the sliding doors, the possibility of the applicants applying for an exemption under the FOSP Act.

## **8. The decision**

- 8.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the barrier to the swimming pool that includes two sliding doors does not comply with Clause F4 of the Building Code, and I therefore confirm the authority's decision not to grant the building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 18 June 2015.

John Gardiner  
**Manager Determinations and Assurance**

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<sup>7</sup> Determination 2007/79 Safety barriers for a swimming pool at 17 Cooper Crescent, Cambridge (*Department of Building and Housing*) 20 July 2007

## Appendix A: The legislation and the acceptable solution

### The Building Code

#### CLAUSE F4—SAFETY FROM FALLING

##### A. OBJECTIVE

**F4.1** The objective of this provision is to safeguard people from injury caused by falling.

##### B. FUNCTIONAL REQUIREMENT

**F4.2** Buildings shall be constructed to reduce the likelihood of accidental fall.

#### PERFORMANCE

**F4.3.1** Where people could fall 1 metre or more from an opening in the external envelope or floor of a building, or from a sudden change in level within or associated with a building, a barrier shall be provided.

Provisions	Limits on application
<p><b>F4.3.3</b> Swimming pools having a depth of water exceeding 400 mm, shall have barriers provided.</p>	<p>Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.</p>
<p><b>F4.3.4</b> Barriers shall:</p> <ul style="list-style-type: none"> <li>(a) Be continuous and extend for the full height of the hazard,</li> <li>(b) Be of appropriate height,</li> <li>(c) Be constructed with adequate rigidity,</li> <li>(d) Be of adequate strength to withstand the foreseeable impact of people and, where appropriate, the static pressure of people pressing against them,</li> <li>(e) Be constructed to prevent people from falling through them, and</li> <li>(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,</li> <li>(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.</li> </ul>	<p>Performance F4.3.4 (f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.</p>
<p><b>F4.3.5</b> Barriers to swimming pools shall have in addition to performance F4.3.4:</p> <ul style="list-style-type: none"> <li>(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</li> </ul>	

## The Acceptable Solution, F4/AS1 (second edition)

- 3.1.1** Fencing for swimming pools shall be constructed to no lesser standard than is required by the Schedule to the Fencing of Swimming Pools Act 1987, to restrict the access of children.

## The FOSP Act

### 2 Interpretation

In this Act, unless the context otherwise requires,—

#### Fence—

- (a) means a fence that complies with the requirements of the building code in force under the Building Act 2004 in respect of swimming pools subject to this Act; and
- (b) includes any part of a building and any gates or doors that form part of the fence

**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

### 5 Exempted pools

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:

### 13B Fencing in accordance with Schedule must be treated as means of compliance

Any provision that is made for the fencing of swimming pools that is in accordance with the Schedule must, in respect of –

- (a) matters subject to the Building Act 2004, be treated as a compliance document establishing compliance with the building code for the purposes of section 19 of that Act, and the requirements of this Act

## The Schedule to the FOSP Act

### 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.

### 2

Any clearance between the bottom of the fence and ground level shall not exceed 100 mm.

### 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