



Determination 2018/005

Whether the use of automatic pool covers to swimming pools complies with Clause F9 of the Building Code and satisfies section 162C of the Building Act

Summary

This determination considers whether automatic pool covers that comply with the ASTM Standard F1346-91 comply with Clause F9 (Restricting access to residential pools) of the Building Code and section 162C of the Building Act. The determination also discusses waivers and modifications, and exemptions that have been granted under the Fencing of Swimming Pools Act 1987 to allow the use of pool covers.

1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.
- 1.2 The party to this determination is Marlborough District Council (“the authority”), as a territorial authority and building consent authority, that applied for the determination.

1.3 The reason for this determination

- 1.3.1 The application for this determination arises from the following:
 - From 1999 the authority has issued 191 exemptions under section 6 of the Fencing of Swimming Pools Act 1987 (“the FOSPA”) to owners of residential swimming pools to allow the use of an automatic pool cover in place of fencing the immediate pool area. The exemptions were subject to conditions and have an expiry date typically 5 to 10 years from the date the exemption was granted.
 - The FOSPA was repealed on 1 January 2017, at which time new provisions concerning residential pools were inserted into the Act. The provisions include: section 162C, which requires residential pools have physical barriers that restrict access to the pools by unsupervised children under five years of age; and 162D which requires territorial authorities carry out inspections at least once every three years to determine whether the pool has a barrier that complies with the requirements of section 162C.
 - The authority has continued to approve the use of automatic pool covers for residential pools in place of fencing, granting building consents that are subject

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

to a modification under section 67 of the Act for Clause F9.3.2(a) of the Building Code² (First Schedule, Building Regulations 1992).

- After seeking guidance from the Ministry and contacting other authorities, the authority became aware that ‘there is some resistance to the use of [automatic pool covers] as a means of compliance’ and that few other authorities accept the use of a pool cover in place of fencing the immediate pool area.

1.4 The matter for this determination

1.4.1 The matter to be determined³ is therefore whether the use of an automatic pool cover that complies with ASTM Standard F 1346-91⁴ and without any other physical barrier to the pool or the immediate pool area complies with Clause F9 of the Building Code and section 162C of the Act. In making this decision I have considered compliance as it concerns:

- section 162C in relation to existing residential pools that were granted exemptions under section 6 of the FOSPA;
- new residential pools where the automatic pool cover is the proposed means of achieving compliance with Clause F9.

1.5 Matters outside this determination

1.5.1 This determination does not consider the authority’s exercise of its powers in granting the modifications it has done for Clause F9.3.2(a). The granting of a waiver or modification must be considered on a case-by-case basis taking into consideration all of the circumstances of the particular case concerned. However I have provided comment on the principles and framework to be considered in granting a waiver or modification (refer paragraph 5.3).

1.5.2 This determination does not consider whether the authority correctly exercised its powers in granting exemptions; that power was exercised under the FOSPA and is not a matter that can be determined under the Act.

2. The pool covers

2.1 This determination does not consider a specific proprietary pool cover, but rather considers automatic pool covers in general that comply with ASTM Standard F 1346-91, which is referenced in NZS 8500 (refer Appendix A.5).

2.2 The covers typically:

- operate using an electrical motor, or may be operated manually when there is a loss of power
- completely cover the pool and steps into the pool
- use guiding tracks that hold the cover in place, with the tracks installed either under the lip of the pool edge or on the pool surround.

2.3 In summary, compliance with the ASTM standard includes performance testing for loading and deflection, and requires:

² In this determination, references to sections are to sections of the Act and references to clauses are to clauses of the Building Code

³ Under section 177(1)(a) of the Act

⁴ American Society for Testing and Materials ASTM International Designation: F 1346-91 Standard Performance Specification for Safety Covers and Labelling Requirements for All Covers for Swimming Pools, Spas and Hot Tubs

- materials and components that are durable under normal conditions at the site
- locking mechanisms or open-close switching devices inaccessible to children under five years of age to inhibit children removing or operating the cover, and fixed in a location in the line of sight of the pool
- no openings, or openings that can be forced to a size, that would allow an object of a set size to pass through or be subject to entrapment
- drainage of standing water from the cover within a period of 30 minutes after cessation of normal rainfall⁵
- labels with warning statements that “non-secured or improperly secured covers are a hazard”.

3. Background

3.1 The FOSPA exemptions

- 3.1.1 Prior to 1 January 2017, the rules relating to providing barriers to pools were governed by the FOSPA and the requirement under the Building Act to comply with Clause F4 (Safety from falling) of the Building Code.
- 3.1.2 The FOSPA provided for exemptions from the requirement to provide a barrier to the pool in certain circumstances (section 5) and provided for authorities to grant special exemptions (section 6) from some or all of the requirements of the FOSPA if the authority was satisfied that such an exemption would not significantly increase danger to young children (refer Appendix A.2).
- 3.1.3 The authority was initially approached about the use of automatic pool covers as a means of complying with the FOSPA in 1999, at which time the authority researched the use of pool covers and found that over 60,000 automatic pool covers were in use around the world. Since 1999 the authority has granted 191 exemptions under section 6 of the FOSPA for the use of automatic pool covers in place of fencing the immediate pool area.
- 3.1.4 The special exemptions were granted with an expiry period of between 5 to 10 years (dependant on durability of the cover), and required the owners ‘to sign an undertaking to ensure that the cover was appropriately operated at all times’.

3.2 The modifications

- 3.2.1 Prior to 1 January 2017, Clause F4.3.4(f) required barriers to restrict access to the pool or immediate pool area by children under 6 years of age. The limits on application meant that this clause did not apply to pools exempt under section 5 of the FOSPA (refer Appendix A.2). I am not aware of whether the authority granted a waiver or modification of this clause in relation to the special exemptions it granted under section 6 of the FOSPA, or whether in the authority’s view a waiver or modification was not required as the authority considered compliance was achieved through the use of the pool cover.
- 3.2.2 The Building Code was amended and Clause F9 inserted on 1 January 2017 (refer Appendix A.4). Clause F9.3.1 requires residential pools to have physical barriers that restrict access to the pool or the immediate pool area by unsupervised young children, and Clause F9.3.2 requires barriers must a) surround the pool (and may

⁵ What constitutes “normal rainfall” is not defined in the Standard

enclose the whole or part of the immediate pool area); or b) in the case of a small heated pool, cover the pool itself.

- 3.2.3 Subsequently the authority approved the use of automatic pool covers through the granting of building consents that were subject to a modification of Clause F9.3.2(a) under section 67 of the Act. The authority notified the Ministry of those modifications as required by section 68 of the Act. The authority has provided to the determination an example of a modification issued, which notes:

Modification from the New Zealand Building Code

1. As an alternative to the fencing of a swimming pool under F9 of the Building Code [a proprietary automatic pool cover] shall be installed and maintained to prevent access to the pool:
 - (a) The Modification from the New Zealand Building Code is on the basis that [the proprietary automatic pool cover] will be installed, maintained and operated at all times in accordance with manufacturer's instructions.
 - (b) The Modification from the New Zealand Building Code will take effect from the date when the applicants have entered into the formal undertaking. The modification will expiry (*sic*) 5 years after that date. At which time the owner of the property must apply for a new modification.

- 3.2.4 The authority attached a number of conditions with the modification, described as "Terms and Conditions". This included (in summary):

- the switch mechanism to be key operated and mounted at least 1.5m above ground level
- when the cover is engaged the key to be kept in a secure location that is inaccessible to children under the age of 5 years
- the pool cover to be engaged at all times the pool is unsupervised
- the owner to notify the authority of a change of ownership or occupation, the owner to obtain from the incoming purchaser or occupier a formal undertaking of compliance with the terms of the modification and that a signed copy of this be deposited with the authority.

- 3.2.5 Since 1 January 2017 the authority has issued approximately 13 building consents subject to a modification of this nature.

- 3.2.6 I note also that the authority has submitted that it proposes to grant modifications under section 67A for those existing pools that were granted exemptions under the FOSPA in relation to compliance with section 162C of the Act.

4. The submissions

- 4.1 The Ministry received the application for a determination on 24 January 2018 and the authority noted that a number of the exemptions issued under the FOSPA were now reaching their expiry date. The authority advised that it proposes to continue to allow the use of automatic pool covers instead of pool fencing where requested by pool owners: for existing pools the authority would require the pool owner to apply for a new building consent that would be subject to a modification under section 67A in respect of section 162C of the Act; and for new pools the authority proposes to continue granting building consents subject to modification of Clause F9.

4.2 In regards to the use of automatic pool covers, the authority submitted the following (in summary):

- The authority is of the view that automatic pool covers meet the requirements of F9.3.1 and F9.3.2 – the cover, when closed, provides a barrier to the pool.
- When the authority considered this issue in 1999, information available at that time ‘confirmed that there had never been an incident of drowning in association with an [automatic pool cover]’.
- To date the authority has not received any notification from the Ministry that the modifications it had granted were not acceptable.
- A previous determination⁶ has stated that pool covers do not comply when they are open – it is the authority’s view that, while the pool cover is open the pool is in use and therefore children are under supervision. The authority considers the situation is no different to a property owners’ responsibility to ensure that pool gates are closed and not temporarily held open or unmaintained, and that doors opening into the pool area are not held open and alarm systems are not turned off for convenience.
- Site audits have confirmed that proportionally more pools fail to meet the compliance requirements because gates were not working than pool covers not being operational. From 427 pool site visits in 2017, 159 pools failed their first audit. Only two of these involved automatic pool covers – one where the owner had failed to close the cover, and one that required maintenance.
- As well as providing a means to restrict access to the pool, the covers also provide other benefits such as preventing wind-blown rubbish entering the pool, reducing heat loss, and reducing the level of chemical treatment. These provide an incentive to keep the pool cover closed when the pool is not in use – in contrast there are no such additional incentives relating to gates.

4.3 In regards to waivers and modifications the authority submitted:

- Section 67A provides for authorities to grant a waiver or modification of section 162C(1) or (2) where it would not significantly increase danger to children under 5 years of age, and the authority considers there is evidence that the use of automatic pool covers does not increase the danger and in fact danger is reduced.
- There are a number of properties with existing pools that have been issued an exemption where, if required, it would be difficult to fully comply with Clause F9 due to positioning and landscaping around the immediate pool area. And the cost of erecting a fence to achieve compliance would be disproportionate to the cost of a new fence in a new build situation.

4.4 A draft determination was issued to the authority for comment on 20 February 2018.

4.5 On 6 March 2018 the Ministry received a response from the authority in the form of a letter dated 21 February 2018. The authority maintained its view that its decisions to allow the use of pool covers were justified and that the evidence of performance supports those decisions. The authority outlined the steps it intended to take in regards to new consent applications and existing pools with the covers. I make no comment on the authority’s approach as that is not a matter for determination.

⁶ Determination 2010/119 The use of a cover as a barrier to a swimming pool (3 December 2010)

5. Discussion

5.1 General

- 5.1.1 The requirements that relate to residential pools are: compliance with Clause F9, for the purpose of a building consent, code compliance certificate or certificate of acceptance; and section 162C of the Act for the purpose of maintaining compliance over time.
- 5.1.2 The objective of Clause F9 is to prevent injury or death to young children involving residential pools, and the functional requirement is residential pools with a maximum depth of water of 400 mm or more must have a means of restricting access that prevents unsupervised access by a child under 5 years of age.
- 5.1.3 The means of meeting the functional requirement in relation to swimming pools is set out in the following performance requirements:
- F9.3.1 requires pools to have physical barriers that restrict access to the pool or immediate pool area by unsupervised young children;
 - F9.3.2(a) requires pool barriers must surround the pool (and may enclose the whole or part of the immediate pool area);
 - F9.3.3 which sets out general requirements relating to barriers and specific requirements for gates;
 - F9.3.4 which sets out requirements relating to doors and windows that form part of a barrier to the pool or immediate pool area.
- 5.1.4 This determination concerns the use of automatic pool covers without any other physical barrier to the pool or the immediate pool area.
- 5.1.5 In the following paragraphs I have considered:
- whether automatic pool covers that are compliant with ASTM Standard F 1346-91 would comply with Clause F9 of the Building Code without any other physical barrier to the pool or the immediate pool area, and
 - compliance with section 162C in relation to existing residential pools with automatic pool covers that were granted exemptions under section 6 of the FOSPA.
- 5.1.6 I have also discussed the principles and framework to apply when considering a waiver or modification of the Building Code.

5.2 Compliance of the automatic pool covers with Clause F9

- 5.2.1 Swimming pools and spa pools present a risk to unsupervised young children, and so the Building Code requires physical barriers that will restrict access by unsupervised young children into the immediate pool area. One common solution to achieving compliance is to fence the immediate pool area.
- 5.2.2 Whatever form of barrier is used, the barrier must be breached in order to gain access to use the pool. To prevent the breach of the barrier continuing longer than is required to simply access the pool, the Building Code has performance requirements that are particular to the common types of physical barriers used – fences and external walls of buildings. The Building Code requires gates in pool fences must be self-closing (F9.3.3(c)) and doors in external walls opening into the immediate pool area must be either self-closing or alarmed (F9.3.4(a)).

- 5.2.3 In this case the authority has granted a number of exemptions under the FOSPA, and subsequent to the repeal of that Act has granted modifications of Clause F9 of the Building Code, on the basis that the authority considers the use of automatic pool covers meets the performance requirements F9.3.1 and F9.3.2 – that is the barrier (in this case the pool cover) surrounds the pool and restricts access to the pool by unsupervised young children.
- 5.2.4 It is accepted that an automatic pool cover is a barrier and has the same effect as a pool fence when the pool cover is closed. This was the position that was taken in Determination 2010/119⁷ which considered whether compliance was achieved when an automatic pool cover that complies with ASTM Standard F 1346-91 is used. That determination concluded that the pool cover as a barrier to restrict access of young children to the pool did not comply with the requirements of Clause F4 of the Building Code that applied at that time. Although the Building Code clauses relevant to pool safety have changed, I consider that the reasoning behind that decision remain relevant:
- when the pool cover is removed so that people can use the pool, the requirements of the Building Code are no longer met; and
 - the pool cover is not “self-closing” in the way that doors and gates are required to be; and
 - the effectiveness of the pool cover is reliant on the behaviour of people using the pool.
- 5.2.5 The essential difference with a pool cover is that a person must take active steps to close the pool cover and it must be closed whenever there is no supervising adult in the pool area, even if the supervising adult only leaves temporarily. This is in contrast with a pool fence that incorporates compliant self-closing gates that cannot readily be opened by young children, where children cannot enter (or re-enter) the pool area because they cannot open the pool gate. A pool cover requires the supervising adult to be very vigilant and never forget to close the pool cover whenever a supervising adult is not in the pool area. That total reliance on the behaviour of the supervising adult to ensure the safety of children under 5 years of age by never forgetting to close the pool cover is the weakness of the pool cover system that does not exist with a barrier with a gate or door that is opened only briefly to provide access into the immediate pool area and then closes automatically.
- 5.2.6 The authority submitted that the owner’s responsibility to close the pool cover whenever they leave the pool area is no different to the responsibility of an owner with a fenced pool not to leave pool gates or doors opening onto the pool propped open or to turn off alarm systems. However, there is an important distinction. With the pool cover the owner must take the positive step of always remembering to close the pool cover to ensure compliance with Clause F9. The examples the authority provided are situations where the owner has already breached Clause F9 by propping open an automatically closing gate or door or turning off an alarm. An owner with a compliant pool fence can leave the pool area and does not have to do anything positive to ensure continuing compliance with Clause F9 – the pool gate or door will close automatically behind them when they leave the pool area or the door alarm will remind them to close the door.

⁷ Determination 2010/119 The use of a cover as a barrier to a swimming pool (3 December 2010)

- 5.2.7 I maintain the view that reliance on the behaviour of people to reinstate the cover is not adequate in terms of meeting the performance requirements of the Building Code in relation to restricting access to the pool by young children.
- 5.2.8 Taking into account the discussion above, I consider that the use of automatic pool covers alone as a barrier to a residential pool does not meet the performance requirement Clause F9.3.1 of the Building Code.

5.3 Waiver or modification

- 5.3.1 I note here that the granting of a waiver or modification of Clause F9.3.1 must be considered on a case-by-case basis taking into consideration all of the circumstances of the particular case concerned. This determination does not consider the authority's exercise of its powers in granting the modifications it already has.
- 5.3.2 Having reached the conclusion that automatic pool covers do not comply with Clause F9, I offer the following comment for the authority to consider in regards to the granting of a waiver or modification of Clause F9.3.1.
- 5.3.3 Section 67 of the Act provides for the granting of a building consent subject to a waiver or modification of the Building Code, and that the waiver or modification may be subject to any conditions that the relevant territorial authority considers appropriate. And section 67A provides for waivers or modifications of section 162C(1) or (2) if the territorial authority is satisfied that the waiver or modification would not significantly increase danger to children under 5 years of age and having regards to all of the relevant circumstances.
- 5.3.4 The power to grant a waiver or modification recognises that the Building Code cannot cover all possible situations, and provides the flexibility for authorities to address unusual sets of circumstances. However, authorities should not grant a waiver or modification if it would be unreasonable to do so.
- 5.3.5 Previous determinations have established that a waiver or modification may be granted only when it is 'explicitly or implied necessary for the granting of a building consent in respect of the building work concerned'⁸ and that 'compelling reasons must exist that support the view that a waiver is appropriate'⁹ and it is reasonable to do so in the circumstances.¹⁰
- 5.3.6 Determination 2015/010¹¹ described a list of factors that should be taken into account when an authority considers whether a modification is reasonable in the specific circumstances of an individual case:
- The extent and possible consequence of the non-compliance with the specific performance clause.
 - The availability of other reasonably practicable solutions that would result in the building work fully complying with the Building Code and associated costs.
 - Any special and unique circumstances of the building work subject to the waiver of modification.

⁸ Determination 2007/110 Building consent for a house on land subject to coastal hazards (17 September 2007)

⁹ Determination 2012/049 Regarding the refusal to issue a code compliance certificate for a 16-year-old house with monolithic cladding (12 July 2012)

¹⁰ Determination 2006/085 Refusal of a code compliance certificate for a building with a plywood cladding system at a house (4 October 2006)

¹¹ Determination 2015/010 Regarding the authority's refusal to grant a modification of Clause C3.4(a) of the Building Code in respect of materials used for internal surface linings at a new school hall (31 March 2015)

- The extent to which the modification will still be consistent with the purposes and principles of the Act.
- The modification complying with the relevant objective and functional requirement of the specific clause of the Building Code.

5.3.7 The purposes and principles of the Act must be taken into account in the performance of the authority's functions or duties or exercise of its powers under the Act: these place particular emphasis on the safety of the people who use buildings and the role that household units play in the lives of the people who use them. Compelling reasons must exist that support the view that a waiver or modification is appropriate.

5.3.8 An automatic pool cover on its own does not address the risk that the pool cover may be left open, even if only temporarily, when there is not a supervising adult present in the pool area thereby leaving the pool open to any young children. It is hard to see how this increased risk is consistent with the objective of clause F9.1 "to prevent injury or death to young children involving residential pools" when compared to the risk associated with a compliant pool fence with gates or doors that automatically close or have alarms to remind users to close them.

5.3.9 While this determination does not consider a specific case, I am of the view that in principle a waiver or modification would not be appropriate to allow the use of automatic pool covers in place of a compliant physical barrier to a pool where it would be feasible to construct or erect a compliant barrier.

5.4 Existing pools subject to exemptions under section 6 of the FOSPA

5.4.1 This determination does not consider whether the authority correctly exercised its powers in granting exemptions under the FOSPA; that power was not exercised under the Building Act and is not a matter that can be determined under the Act.

5.4.2 The FOSPA was repealed on 1 January 2017 and the relevant clauses of the Building Code replaced, at which time the Act was also amended to incorporate a set of special provisions relating to residential pools. The provisions include:

- section 162C, which requires residential pools have physical barriers that restrict access to the pools by unsupervised children under 5 years of age;
- section 162D which requires inspections of residential swimming pools at least once every three years to determine whether the pool has a barrier that complies with the requirements of section 162C;
- and the savings and transitional provisions that apply to fencing of residential pools in accordance with the Schedule of the FOSPA (section 450A) and residential pools constructed, erected or installed before 1 January 2017 (section 450B).

5.4.3 The existing residential swimming pools for which the authority previously granted exemptions under section 6 of the FOSPA will be subject to inspection at least once every three years to determine whether the pools have a barrier that complies with section 162C.

- 5.4.4 Under section 162C(2), the means of restricting access to the pool must comply with the requirements of the Building Code –
- (a) that are in force; or
 - (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).
- 5.4.5 Based on the conclusion reached in this determination that the automatic pool cover does not comply with Clause F9.3.1, and that the same conclusion was reached in a previous determination in regards to the then relevant Clause F4, it follows that the use of the automatic pool cover does not comply with section 162C(2) unless it is subject to a waiver or modification granted under section 67A.
- 5.4.6 The savings and transitional provisions must also be considered. Section 450A applies to the fencing of residential pools in accordance with Clauses 1 to 10 of the Schedule of the FOSPA. An automatic pool cover does not comply with the Schedule and accordingly section 450A does not apply.
- 5.4.7 Section 450B(2) sets out circumstances where an existing pool is deemed to have barriers that comply with section 162C of the Act as follows:
- (2) An existing pool is deemed to have barriers that comply with section 162C if the barriers—
 - (a) complied with the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force) immediately before 1 January 2017; and
 - (b) continue to comply with those requirements subject to—
 - (i) any exemption that was granted under section 6 or clause 11 of the Schedule of that Act and that was subsisting immediately before 1 January 2017; and
 - (ii) the conditions of any such exemption.
- 5.4.8 Section 450B(2)(b) applies to the pools for which the authority has granted exemptions under section 6 of the FOSPA, subject to compliance with any conditions of the exemptions.
- 5.4.9 However, the exemptions issued by the authority were issued with expiry dates. Once the expiry date is reached section 450B(2)(b) will no longer apply. I note also that to re-issue the exemption would require the authority exercise a power under the FOSPA, and that power is no longer available to the authority. Accordingly those residential pools issued with exemptions under the FOSPA that were issued with expiry dates will not fall within the savings and transitional provisions of the Act after the exemption expires, and must then comply with section 162C of the Act.

6. The decision

- 6.1 In accordance with section 188 of the Building Act 2004, I determine that the use of an automatic pool cover that complies with ASTM Standard F 1346-91 and without any other physical barrier to the pool or the immediate pool area does not comply with Clause F9 of the Building Code and section 162C of the Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 21 March 2018.

Katie Gordon
Manager Determinations

Appendix A: The legislation

A.1 The relevant sections of the Building Act

67 Territorial authority may grant building consent subject to waivers or modifications of building code

- (1) A building consent authority that is a territorial authority may grant an application for a building consent subject to a waiver or modification of the building code.
- (2) A waiver or modification of the building code under subsection (1) may be subject to any conditions that the territorial authority considers appropriate.

...

67A Territorial authority may grant waivers or modifications in relation to means of restricting access to residential pools

- (1) A territorial authority may grant a waiver or modification of section 162C(1) or (2) (which requires residential pools to have means of restricting access by unsupervised children) if the territorial authority is satisfied that the waiver or modification would not significantly increase danger to children under 5 years of age.
- (2) In deciding whether to grant a waiver or modification under subsection (1), the territorial authority must have regard to all of the relevant circumstances (including the particular characteristics of the pool and the land on which it is situated).

Section 67A: inserted, on 1 January 2017, by section 9 of the Building (Pools) Amendment Act 2016 (2016 No 71).

162C Residential pools must have means of restricting access

- (1) Every residential pool that is filled or partly filled with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age.
- (2) The means of restricting access referred to in subsection (1) must comply with the requirements of the building code—
 - (a) that are in force; or
 - (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).
- (3) In the case of a small heated pool, the means of restricting access referred to in subsection (1) need only restrict access to the pool when the pool is not in use.
- (4) The following persons must ensure compliance with this section:
 - (a) the owner of the pool:
 - (b) the pool operator:
 - (c) the owner of the land on which the pool is situated:
 - (d) the occupier of the property in or on which the pool is situated:
 - (e) if the pool is subject to a hire purchase agreement (as that term is defined in the Income Tax Act 2007), the purchaser of the pool:
 - (f) if the pool is on premises that are not subject to a tenancy under the Residential Tenancies Act 1986 but the pool is subject to a lease or is part of premises subject to a lease, the lessee of the pool or the premises.

162D Periodic inspections of residential pools

- (1) Every territorial authority must ensure that the following residential pools within its jurisdiction are inspected at least once every 3 years, within 6 months before or after the pool's anniversary date, to determine whether the pool has barriers that comply with the requirements of section 162C:
 - (a) residential pools other than small heated pools:
 - (b) small heated pools that have barriers that are not exempt, in terms of Schedule 1, from the requirement to have a building consent.
- (2) A territorial authority may accept a certificate of periodic inspection from an independently qualified pool inspector for the purpose of subsection (1) in lieu of carrying out an inspection under section 222.
- (3) If a territorial authority decides not to accept a certificate of periodic inspection from an independently qualified pool inspector under subsection (2), the territorial authority must, within 7 working days of making that decision, give notice to the chief executive of the decision and the reasons for the decision.
- (4) If an independently qualified pool inspector inspects a pool for the purpose of this section and decides that the pool does not have barriers that comply with the requirements of section 162C (subject to any waiver or modification granted under section 67A or 188), the inspector must, within 3 working days of the date of inspection, give written notice to the relevant territorial authority of the decision, attaching any information that the chief executive requires to accompany the notice.
- (5) In this section,—

anniversary date, in relation to a pool, means—

- (a) the date of issue of the code compliance certificate or the certificate of acceptance in respect of the pool; or
- (b) in the case of a pool that did not require a building consent,—
 - (i) the date on which notice was given under section 7 of the Fencing of Swimming Pools Act 1987; or
 - (ii) if subparagraph (i) does not apply, the date on which the existence of the pool came to the knowledge of the territorial authority

certificate of periodic inspection means a certificate that—

- (a) is issued by an independently qualified pool inspector; and
- (b) is in the prescribed form (if any); and
- (c) certifies that a pool has barriers that comply with the requirements of section 162C (subject to any waiver or modification granted under section 67A or 188).

450B Savings provision for existing residential pools

- (1) This section applies to a residential pool that was constructed, erected, or installed before 1 January 2017 (an existing pool).
- (2) An existing pool is deemed to have barriers that comply with section 162C if the barriers—
 - (a) complied with the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force) immediately before 1 January 2017; and
 - (b) continue to comply with those requirements subject to—
 - (i) any exemption that was granted under section 6 or clause 11 of the Schedule of that Act and that was subsisting immediately before 1 January 2017; and
 - (ii) the conditions of any such exemption.

- (3) Alternatively, an existing pool is deemed to comply with section 162C if all of the following apply:
- (a) the outside surface of the side walls of the pool is constructed so as to inhibit climbing; and
 - (b) no part of the top of any side wall of the pool is less than 1.2 m above—
 - (i) the adjacent ground level; and
 - (ii) any permanent projection from the ground outside of the pool and within 1.2 m of the walls of the pool; and
 - (iii) any object standing on the ground outside of the pool and within 1.2 m of the walls of the pool; and
 - (c) any ladder or other means of access to the interior of the swimming pool—
 - (i) can be readily removed or made inoperable; and
 - (ii) is removed or made inoperable whenever the pool is not intended to be in use.

Sections 162C, 162D, 450A and 450B were inserted, on 1 January 2017, by section 17 of the Building (Pools) Amendment Act 2016 (2016 No 71).

A.2 The relevant sections of the Fencing of Swimming Pools Act 1987 (repealed 1 January 2017)

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:
- (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 Special exemptions

(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), that such an exemption would not significantly increase danger to young children.

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

(3) Any exemption granted or condition imposed under this section may be amended or revoked by a territorial authority, by resolution.

A.3 The relevant sections of the Building Code – *prior to 1 January 2017*

Clause F4—Safety from falling

Objective

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

Functional requirement

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

Performance

F4.3.3 Swimming pools having a depth of water exceeding 400 mm, shall have barriers provided.

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.

Limits on application

Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

Performance F4.3.4(f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

A.4 The relevant clauses of the Building Code – *inserted on 1 January 2017*

Clause F9—Means of restricting access to residential pools

Objective

F9.1 The objective of this provision is to prevent injury or death to young children involving residential pools.

Functional requirement

F9.2 Residential pools with a maximum depth of water of 400 mm or more that are filled or partly filled with water must have means of restricting access that prevents unsupervised access by a child under 5 years of age.

Performance

F9.3.1 Residential pools must have or be provided with physical barriers that restrict access to the pool or the immediate pool area by unsupervised young children (ie, under 5 years of age).

F9.3.2 Barriers must either—

Limits on application

In the case of a small heated pool, the means of restricting access referred to in Performance F9.3.1 need only restrict access to the pool when the pool is not in use.

Performance F9.3.2(b) applies only to

(a) surround the pool (and may enclose the whole or part of the immediate pool area); or

(b) in the case of a small heated pool, cover the pool itself.

F9.3.3 A barrier surrounding a pool must have no permanent objects or projections on the outside that could assist children in negotiating the barrier.

Any gates must—

(a) open away from the pool; and

(b) not be able to be readily opened by children; and

(c) automatically return to the closed position after use.

F9.3.4

Where a building forms all or part of an immediate pool area barrier,—

(a) doors between the building and the immediate pool area must not be able to be readily opened by children, and must either—

(i) emit an audible warning when the door is open; or

(ii) close automatically after use:

(b) windows opening from a building into the immediate pool area must be constructed or positioned to restrict the passage of children.

F9.3.5 Where a cover is provided as a barrier to a small heated pool, it must—

(a) restrict the entry of children when closed; and

(b) be able to withstand a reasonably foreseeable load; and

(c) be able to be readily returned to the closed position; and

(d) have signage indicating its child safety features.

those *small heated pools* where the top surface of every wall of the *pool* is at all points not less than 760 mm above the adjacent floor or ground and the walls of the *pool* inhibit climbing.

A.5 Relevant extract from the New Zealand Standard NZS 8500:2006

2.3 Requirements for new and existing pools

2.3.1 General

NZS 8500 has been developed on the basis that TAs will gradually seek an upgrade of exiting pools over a transitional period. It is expected that this transitional phase would be completed within 5 years of the publication of this Standard.

2.3.2 Specific requirements for pools

For new and existing 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 F1346-91, and

(ii) An alarm complying with UL 2017 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.

...

NOTE–

(1) ...

(2) The TA has the authority under the FOSP Act to provide an exemption for a specific pool and the [then] Department of Building and Housing can make determinations on specific pools.

It is the responsibility of the property owner(s) or person(s) in possession of the property on which any pool is situated to ensure that the pool is not filled or partly filled with water at any time when the person(s) knows or could reasonably be expected to know that the pool/fence/barrier does not comply with this Standard. This means that the property owner(s) or person(s) in possession of the property must check that any layers of protection are functioning at all times.