



## Determination 2019/026

# Regarding the compliance of a pool barrier to the extent required by section 162C of the Building Act at 121 Foley Quarry Road, Auckland

### Summary

This determination considers the compliance of a pool barrier made up of walls and doors of a building that was subject to an exemption under the Fencing of Swimming Pools Act. The determination considers whether the barrier complies to the extent required by section 162C of the Act.

### 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, 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 parties to the determination are:
  - the owners of the property A and A Maharaj, who applied for this determination (“the owners”)
  - Auckland Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3 This determination arises from a failed inspection<sup>2</sup> of a residential swimming pool. The authority is of the view that the pool barrier does not meet the requirements of Building Code Clause F9<sup>3</sup>. Means of restricting access to residential pools and therefore the barrier does not comply to the extent required by section 162C. The owners are of the view that with an audible alarm fitted to the bi-folding doors the barrier will satisfy the Building Code requirements.
- 1.4 The pool is enclosed within a room of the house and was given an exemption under section 5(e) of the Fencing of Swimming Pools Act 1987 (“FOSPA”).
- 1.5 The Act was amended on 1 January 2017 to incorporate a set of provisions relating to residential pools. Section 162C of the Act requires that residential pools have physical barriers that restrict access to the pools by unsupervised children under five years of age.

<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> Section 162D of the Building Act requires residential pools are inspected at least once every three years to ensure ongoing compliance to the extent required by section 162C.

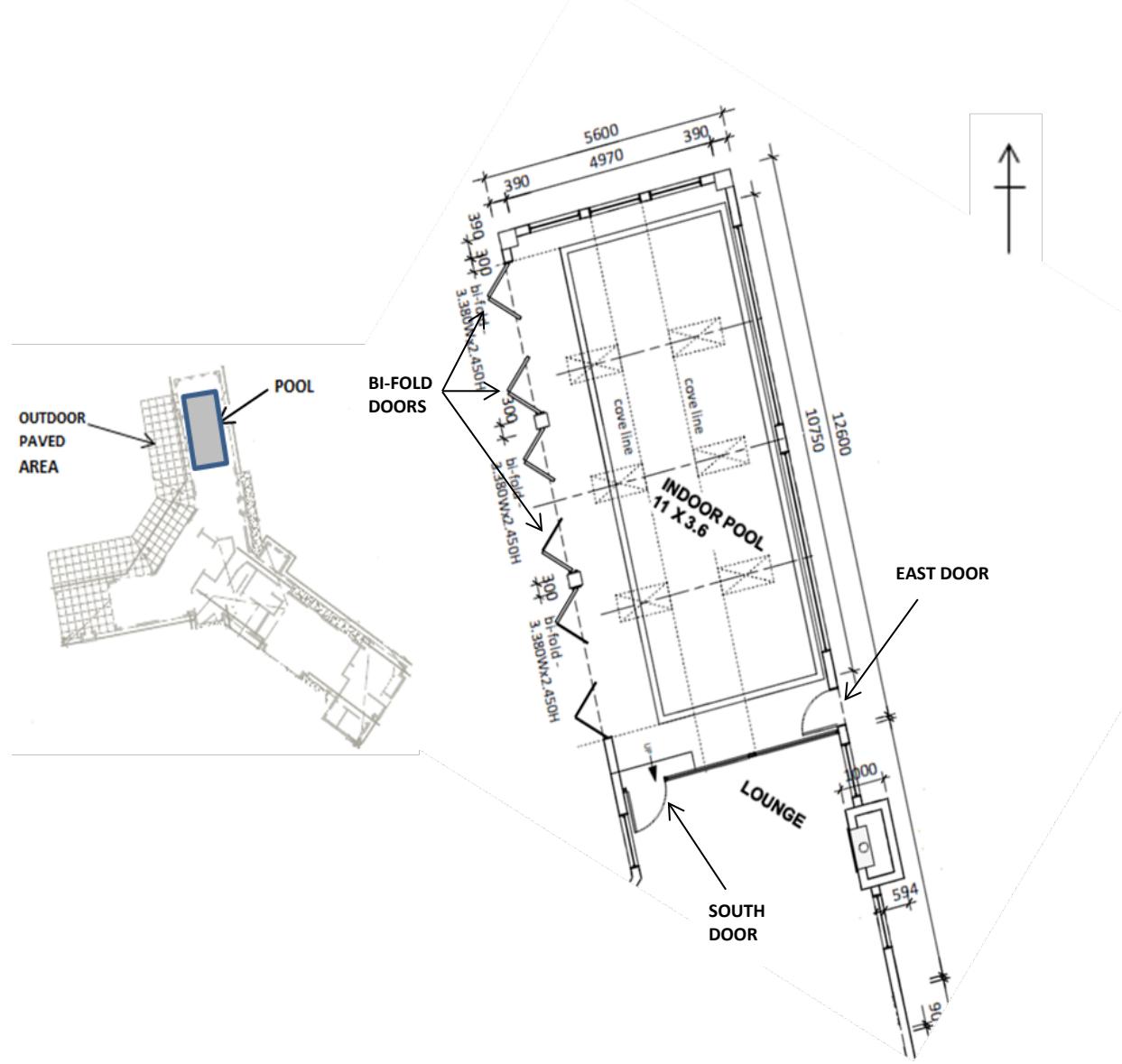
<sup>3</sup> In this determination references to sections are to sections of the Act, and references to clauses are to clauses of the Building Code (Schedule 1, Building Regulations 1992)

- 1.6 The matter to be determined<sup>4</sup> is therefore whether the physical barrier made up of the walls and doors surrounding the pool complies to the extent required by section 162C. In deciding this matter, I must consider whether the barrier complies by way of section 162C(2) or the transitional and savings provisions in sections 450A or 450B. Following this I will discuss safety considerations in regard to the proposed alarm system.
- 1.7 In making my decision, I have considered the submissions of the parties and other evidence in this matter.
- 1.8 The relevant sections of the Act and FOSPA, and Clauses of the Building Code discussed in this determination can be found in Appendix A.

## 2. The background and the barrier

The pool that is subject of this determination is enclosed within a purpose built room on the north-west side of the house. It is set into the ground and is approximately 11m by 3.6m.

**Figure 1: Site plan showing layout and features of pool (not to scale)**



<sup>4</sup> Under section 177(1)(a) of the current Act

- 2.1 The walls and doors form the barrier surrounding the immediate pool area. An internal wall located south of the pool is connected to the lounge area and has an entry door which the authority considers is compliant; the door is fitted with a pin protected lock system and a self-closer.
- 2.2 The north facing wall has three windows, two of which open and are fitted with restrictors. The east wall has a window that does not open and a single glass hinged door that has a pin protected lock system and a deadlock at 1.5m off the ground that requires a key to open it (the door is referred to in this determination as the “east door”). The west facing wall has three glass double-panel hinged bi-folding doors that open out to an outside paved area.
- 2.3 The three bi-folding doors fit from ceiling to floor and are separated by dividing parts of the wall. The bi-fold doors have deadlocks fitted at the top and bottom as well as a locking mechanism located approximately 1.5m above floor level. The mechanism to lock each of the bi-fold doors requires them to be pulled closed, folded flat then the handle has to be lifted upwards to secure their position.
- 2.4 The house is located in a rural location on a 2-hectare section. Building Consent was issued on 21 July 2014 for the dwelling and indoor swimming pool and it was constructed from 2014 through 2015. The relevant regulations that applied at the time in respect of restricting access to the pool were the FOSPA and Clause F4 Safety from falling of the Building Code.

### **3. The 2018 pool inspection**

- 3.1 On 2 August 2018 the authority conducted an inspection of the pool as required under section 162D of the Act. That section of the Act requires territorial authorities to ensure periodic inspections of residential pools are carried out to determine whether the pool has a barrier that complies with the requirements of section 162C.
- 3.2 Following the inspection the authority informed the owners that the pool failed to pass, detailing this on a “swimming and spa pool fencing inspection checklist” (“the checklist document”).
- 3.3 On the checklist document the authority listed two requirements for the owners to achieve in order to satisfy compliance which stated –
  - (1) ‘the single door opening outside needs to be fitted with a self-closing device to automatically self-close and self-latch ....’
  - (2) ‘the bi-fold doors [are] no longer permitted to be a barrier’ and the officer suggested remedies to achieve compliance for the bi-fold doors.
- 3.4 In order to remedy the non-compliance the officer suggested to “install a new fence on the outside of the bi-fold doors, following the lines of the tiled areas outside, and then come back to meet the house wall again.” The authority further suggested that they may wish to “block one or two doors permanently shut and have a fence on the outside of the one door ...”, with this the authority added that “all fencing and gates must be 1.2m high with a compliant gate opening away from the pool, self-closing and self-latching with 1.5m high latch or for glass gates it can be 300mm down on the inside.”

- 3.5 In summary, the options proposed by the authority are to fit a self-closing device to the east door and to install a fence and self-closing gate around one bi-fold door and permanently lock the other two doors, or alternatively to fence and gate the entire paved area to enclose all three bi-fold doors.
- 3.6 The owners did not agree with the authority's interpretation and considered that the barrier to the pool had sufficient features built in to restrict unsupervised young children from entering the pool area, and that as those features complied when construction of the house was completed (in 2015), they must still be compliant.
- 3.7 Based on the information provided, it is my understanding that the authority has not issued a notice to fix but rather has given the owners a "failed inspection notice" to allow the owners an opportunity to remedy the issues that the authority considers do not comply.
- 3.8 The Ministry received an application for a determination on 5 December 2018.

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

- 4.1 The owners included a submission in support of the application for determination that stated (in summary):
- The pool was designed "to ensure that it had significant safety features built in to protect young children". These safety features included a self-closing door on the south wall of the house, a security system with pin protection, deadlocks and full visibility of the pool with floor to ceiling glass. These features were installed at significant cost.
  - The three bi-fold doors "are very heavy and require an adult to open them". The doors have a swivel mechanism that requires strength to open and cannot be reached by young children. There are no handles on the outside of the doors, meaning they can only be opened from the inside.
  - Remedies suggested by the authority were investigated; however the cost involved in the suggested fencing options are substantial. This expense could have been avoided if they were incorporated into the original design.
  - The owners also submitted that "the bi-fold doors are rarely used and the safety feature, of an added audible alarm provides further security on top of existing features such as deadlocks". The proposed alarm will have sensors that will sound when the door is open and would also be connected to the house alarm system which is monitored.
  - The bi-fold doors extend beyond one metre<sup>5</sup> when they are open; however the proposed alarm would prevent the doors fully opening.
  - The area outside of the pool is monitored by a CCTV camera.
  - The pool is located on a two-hectare rural block surrounded by streams and a large pond which could pose a greater safety risk to children than the risk posed by bi-fold doors opening to a pool.

---

<sup>5</sup> Refer Acceptable Solution F9/AS1 paragraph 4.2.1 "Doors in a building wall that provide access into the immediate pool area shall be single leaf doors that are not more than 1000 mm in width. These doors shall be side hinged or sliding."

- 4.2 With the application, the owners provided copies of:
- correspondence with the authority
  - photographs of the pool area
  - a quote for a glass barrier encompassing the entire outdoor paved area and three bi-fold doors on the west wall.
- 4.3 On 7 February 2019 I requested information from the parties about the building consent and information about the exemption under section 5 of FOSPA. I received a response from the authority on 8 February 2019.
- 4.4 On 1 March 2019 I requested information about the features of the bi-fold doors and what alarm system the owners propose to fit on the bi-fold doors, and on 26 April 2019 I requested further information on the lock mechanisms of the bi-fold doors and a site plan. I received responses from the owners on 29 and 30 April 2019 explaining how the lock mechanism works and providing a site plan of the house. I also received response in regard to the alarm system on 13 March 2019.
- 4.5 The authority made a brief submission dated 10 January 2019 in response to the application for determination that stated (in summary):
- The bi-fold doors will allow access to the immediate pool area and as a result do not meet the requirements of Building Code Clause F9 and the Acceptable Solution F9/AS1.
  - The bi-fold doors are not compliant as “they open more than one metre and run down the entire side of the pool and should have alarms and self-latching devices installed”.
  - As the bi-fold doors cannot be made self-closing, a remedy to this can be to install a complying fence and self-closing gate around the outside paved area of the pool house.
- 4.6 The authority provided copies of:
- the swimming and spa pool fencing inspection checklist
  - photographs of the pool area and bi-fold doors
  - A sketch on a photograph of the outdoor paved area of a suggested fence positioned around the bi-fold doors.
- 4.7 On 11 April 2019 I requested and received information from the authority in regard to the consent documentation and exemption under the FOSPA. The authority provided the consent document and confirmed that there was no documentation of the exemption and that it was an automatic exemption for indoor pools under section 5 of the FOSPA.
- 4.8 The draft determination and further submissions**
- 4.8.1 A draft of this determination was issued to the parties for comment on 27 May 2019. The draft concluded that the physical barrier to the pool, specifically the bi-fold doors and the east door, did not comply with section 162C of the Act.
- 4.8.2 The council accepted the draft on 4 June 2019, with clarification of the following (in summary):

- The authority has previously asked the applicant to install a self-closing device to the east door.
  - It is unclear whether the bi-fold doors would comply if they have an alarm fitted that meets the criteria of the Acceptable Solution F9/AS1<sup>6</sup>.
- 4.8.3 The owners accepted the draft in a response provided on 6 June 2019, noting their conclusion was that while the pool barrier is currently not compliant it will become compliant upon installation of an audible alarm to the bi-fold doors and the installation of a self-closing latch to the east door.

## 5. Discussion

### 5.1 The Legislation

- 5.1.1 Prior to 1 January 2017, the rules relating to pool barriers were governed by FOSPA and the requirement under the Act to comply with Clause F4 Safety from Falling of the Building Code.
- 5.1.2 FOSPA was repealed on 1 January 2017, at which time the Act was amended to incorporate a set of special provisions relating to residential pools (sections 162A to 162E) and Clause F9 was inserted into the Building Code. The purpose of the residential pools provisions is to prevent drowning of or injury to young children by restricting access to residential pools by unsupervised children under five years of age.
- 5.1.3 Section 162C of the Act requires:
- (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.
- 5.1.4 The requirement for a physical barrier to restrict access applies to all residential pools regardless of when the pool was constructed.
- 5.1.5 Section 162C(2) provides that the physical barrier 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).
- 5.1.6 For the purpose of this discussion, and given the date of construction of the pool, the transitional and savings provisions in sections 450A and 450B (appended) are also relevant.
- 5.1.7 Section 450A of the Act sets out the transitional and savings provision for residential pools, and subsection (1) provides:
- (1) Fencing of a residential pool in accordance with clauses 1 to 10 of the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force immediately before 1 January 2017) is an acceptable solution for establishing compliance with the building code for the purpose of section 162C.
- 5.1.8 Section 450B sets out the savings provision for existing residential pools that were constructed before 1 January 2017, which this pool was. Subsection (2) provides:

---

<sup>6</sup> Acceptable Solution F9/AS1 for New Zealand Building Code Clause F9 Means of restricting access to residential pools (1<sup>st</sup> ed. 27 April 2017)

- (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.
- 5.1.9 Accordingly, there are four compliance pathways available to establish compliance for the purpose of section 162C:
- compliance with Clause F9 of the Building Code as it is currently in force
  - compliance with Clause F4 of the Building Code as it was in force at the time the pool was consented
  - compliance with Clauses 1 to 10 of Schedule 1 of FOSPA as an Acceptable Solution
  - compliance with Schedule 1 of FOSPA, subject to any exemption under section 6 or Clause 11 of the Schedule and compliance with the conditions of any such exemption.
- 5.1.10 I note here for completeness that section 6 of FOSPA referred to above provided for discretionary exemptions to be granted by territorial authorities, where such an exemption would not significantly increase the danger to young children. No exemption under section 6 was considered in this instance; rather the pool was subject to an exemption under section 5(e) of FOSPA.
- 5.1.11 Before considering whether the barrier, or more specifically the bi-fold doors and the east door, achieves compliance by way of one of those four pathways, I discuss first the relationship between FOSPA and the Act, and the exemption granted under FOSPA.
- ## **5.2 FOSPA and the Act**
- 5.2.1 Section 8(1) of FOSPA required:
- Every owner of a pool to which this Act applies shall ensure that, except as provided in any exemption granted under section 6, the pool, or some or all of the immediate pool area<sup>[7]</sup> 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.
- 5.2.2 However, in this case the pool was exempt under section 5 of FOSPA. Section 5(e) of FOSPA, prior to its repeal, provided exemptions from the requirements of FOSPA for:
- 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
- 5.2.3 The effect of the section 5(e) exemption was that nothing in FOSPA applied to this pool.

---

<sup>7</sup> Section 2 of the FOSPA: “Immediate pool area” means the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool.

- 5.2.4 Despite this, section 17 of the Building Act requires all building work must comply with the Building Code, and this included the requirement to comply with Clause F4 that was current at the time the building consent was issued, subject to any waiver or modification of that clause.
- 5.2.5 The relevant clause of the Building Code in force at the time of construction of the pool was Clause F4 Safety from falling. I note that for the purpose of establishing compliance with Clause F4, the Acceptable Solution at the time (F4/AS1<sup>8</sup>) is cited in Schedule 1 of FOSPA.
- 5.2.6 The objective of Clause F4 was to safeguard people from injury caused by falling, and that included injury or death caused by a fall into a swimming pool. The performance criteria specific to swimming pools were Clauses F4.3.3, F4.3.4(f) and F4.3.5:
- 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.
- 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
- 5.2.7 However, the limits on application for those clauses stated that they “shall not apply to any pool exempted under section 5 of [FOSPA]” (refer Appendix A). This means that as the applicants’ pool was exempt under section 5 of FOSPA the performance criteria in Clause F4 as it relates to the means of restricting access to the pool did not apply.

### **5.3 Compliance with section 162C**

- 5.3.1 As noted in paragraph 5.1.9, there are four compliance pathways available to establish compliance of the pool barrier with section 162C, and because the pool was constructed in 2014/2015 under a building consent, compliance with section 162C can be established through any one of those four pathways.
- 5.3.2 I have considered first whether the barrier complies to the extent set out in section 162C(2)(b). For this subsection to apply:
- the pool must have been constructed, erected or installed after 1 September 1987, and
  - the barrier to the pool must have been subject to a building consent, code compliance certificate, or a certificate of acceptance.
- 5.3.3 If those two criteria are met, then 162C(2)(b) applies and continued compliance with the requirements of the Building Code that were in force when the pool was constructed will satisfy section 162C(1).
- 5.3.4 It could be argued that because this pool was exempt from the requirement to have a barrier under section 5(e) of FOSPA and the limits on application applied as per the

---

<sup>8</sup> F4/AS1 Compliance document for New Zealand Building Code Clause F4 Safety from falling (3<sup>rd</sup> ed. Effective from 21 June 2007 to 30 May 2017)

Building Code in force at the time, the building consent was not approved “in relation to the means of restricting access to the pool”. If that is the case, the pathway via section 162C(2)(b) is not available as a means of establishing compliance and the barrier would be required to comply with the Building Code in force at this time.

- 5.3.5 I note also that the limits on application mean, in effect, that no barrier was required for pools that were exempt under section 5 of FOSPA by virtue of the pool being wholly enclosed within the building. On that basis it could also be argued that this pool is compliant with section 162C without any need for a barrier simply on the basis that the pool is wholly enclosed within the building. I do not agree with this view.
- 5.3.6 Section 162C(1) of the Act requires every residential pool must have physical barriers that restrict access to the pool by unsupervised children under five years of age. That requirement applies to every residential pool regardless of when the pool was constructed or whether it was subject to an exemption under FOSPA, and the function of the physical barrier is to prevent injury or death to young children by restricting their access to the pool. There are no transitional or savings provisions that would mean pools exempt under section 5(e) of FOSPA are not required to comply with section 162C(1) of the Act; meaning that a pool exempt under section 5(e) of FOSPA must have a physical barrier that restricts access by unsupervised children under five years of age.
- 5.3.7 I am of the opinion that an interpretation that pools exempt under section 5(e) of FOSPA or within the limits of application of Clause F4 at the time of construction now meet the requirements of section 162C without a barrier would be inconsistent with the purposes of the Building Act<sup>9</sup> and inconsistent with the purpose of the special provisions of the Act concerning residential pools.
- 5.3.8 In my opinion, for the purpose of compliance with section 162C(1) the physical barrier in this case is formed by the walls, doors and windows of that part of the building in which the pool is housed, and it is appropriate to consider the remaining pathways described in paragraph 5.1.9 as a means of establishing compliance with section 162C.

#### **5.4 Schedule 1 of FOSPA**

- 5.4.1 I have considered the compliance of the pool barrier, more specifically the bi-fold doors and the east door, with the various clauses of Schedule 1 of FOSPA. I refer below to Clauses 8 to 11 in particular as they relate to gates and doors, the operation of gates and doors, and doors in walls of buildings.
- 5.4.2 Clause 8(b) of the Schedule requires:
  - Every gate or door shall be so constructed as to comply with the relevant requirements of clauses 1 to 7, and shall be so mounted that—
    - (a) it cannot open inwards towards the immediate pool area;
    - (b) it is clear of any obstruction that could hold the gate or door open and no other means of holding the gate or door open is provided
- 5.4.3 The east door opens outward, and the bi-fold doors open with a sideways sliding action. Both will remain open unless some action is taken to close them.

---

<sup>9</sup> Specifically section 3(a)(i) “...to ensure that – people who use buildings can do so safely and without endangering their health;”

5.4.4 Clause 9(1) requires “every gate or door shall be fitted with a latching device” and the remaining subsections in Clause 9 relate to accessing the latching device from the outside, either by reaching over the top, through a hole or otherwise.

5.4.5 I note here that –

- the bi-fold doors are not able to be opened from the outside, and accordingly those subsections are not relevant in terms of the performance of the doors.
- the bi-fold doors are fitted with a latching device
- the east door has a deadlock at 1.5m high off the ground which acts as a latching device. The door has a handle on the outside. In order to open the door it requires turning the handle, inputting a pin number into the pin pad and opening the deadlock with a key.

5.4.6 Clause 10 of the Schedule requires:

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.

5.4.7 The authority previously asked the owners to fit a self-closing device to the east door, which the owners have agreed to do. Given the assurances in the owners’ response to the draft determination to install a self-closing device to the east door I consider that with the self-closing device the door will satisfy the requirements of Clauses 9(1) and 10, and therefore comply with the FOSPA Schedule.

5.4.8 The bi-fold doors are not self-closing nor self-latching. Hence the barrier does not comply with Clause 10 of the Schedule, and therefore it cannot comply with section 162C by way of the transitional and savings provision 450A.

5.4.9 Clause 11 of Schedule 1 concerns doors in buildings that form part of the barrier, but it does not apply to pools contained within the building. Accordingly the barrier in this case cannot comply with section 162C by way of the savings provision 450B.

## **5.5 Compliance with the current Building Code**

5.5.1 I now consider whether the barrier, specifically the bi-fold doors and the east door, comply with the requirements of the Building Code that is currently in force. The relevant clause is F9 Means of restricting access to residential pools, and Clause F9.3.4 sets out the performance criteria for doors:

**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;

5.5.2 The first step is to consider whether the bi-fold doors are “able to be readily opened by children”. Given the fact that the bi-fold doors have no hardware on the outside, and taking into account the weight of the doors and the mechanics of opening the doors, I do not consider the bi-fold doors would be “readily opened by children” from outside the pool area.

5.5.3 To open the east door requires the combination of inputting a pin number, turning the handle and unlocking the deadlock, at around 1.5m high, with a key. I am of the view this door is not able to be readily opened by children under 5 years of age.

5.5.4 However, neither the bi-fold doors nor the east door currently meet the other criterion – the doors do not close automatically after use nor is an alarm fitted. Therefore, the bi-fold doors and the east door do not comply with F9.3.4 and therefore do not comply with section 162C by way of the current Building Code.

## 5.6 Conclusion

5.6.1 I conclude that the physical pool barrier, specifically the bi-fold doors and the east door, does not comply with section 162C of the Act by way of the transitional and savings provisions 450A or 450B, nor with Clause F9 of the Building Code currently in force.

## 5.7 What is to be done?

5.7.1 In their submission, the owners proposed to install a self-closing mechanism on the east door and an audible alarm system on the bi-fold doors. The proposed alarm was not specified, but the owners state it would have sensors, it would sound when the bi-fold door/s are open, and it would be connected to the existing house alarm system. The owners also submitted that the alarm will sound if the bi-fold door/s are opened beyond one metre.

5.7.2 It is not for me to say how the pool barrier 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. I have not considered the alarm system in any detail, and it is for the owners to present an alarm system for authority to consider compliance. However, I offer the following comments for the parties to consider.

5.7.3 The Building Code does not prescribe mandatory features for an audible alarm, except for stating that it must sound when the door is open. In this matter I strongly suggest the owners refer to F9/AS1 for guidance:

### 4.2.4 A door alarm shall:

- a) Produce an alarm tone of 75dBAL<sub>10</sub> when measured at a distance of 3000 mm that commences 7 seconds after the door's self-latching device is released, and
- b) Automatically return to a state of readiness when the door is closed and latched, and
- c) Have a low battery charge warning that may be visual or audible.

### 4.2.5 Door alarms may be provided with a deactivation switch placed not less than 1500 mm above floor level that silences the alarm for not more than 15 seconds.

**Comment:** A deactivation switch can be useful when maintenance materials or pool furniture needs to be moved through a door.

5.7.4 I note also a comment in F9/AS1 notes how doors that satisfy the Acceptable Solution:

...enable the barrier to the pool to remain effective except when the doors are briefly used for access.

5.7.5 This comment illustrates the intent to minimise the length of time the barrier is open and ineffective. When the pool is in use, reinstated barriers prevent young children entering the area without the knowledge of a supervising person. The requirement for a door to close automatically or have an alarm prevents the barrier from being accidentally or intentionally left open.

## **6. The decision**

- 6.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the barrier to the pool does not comply with section 162C of the Act.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 25 June 2019.

Katie Gordon  
**Manager Determinations**

## Appendix A

### The Legislation

#### A.1 Relevant sections of the Building Act 2004:

##### **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.

#### **450A Transitional and savings provision for residential pools**

- (1) Fencing of a residential pool in accordance with clauses 1 to 10 of the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force immediately before 1 January 2017) is an acceptable solution for establishing compliance with the building code for the purpose of section 162C.
- (2) Sections 22(2) and (3), 23, 24, and 25A apply to the acceptable solution in subsection (1) as if it had been issued by the chief executive under section 22(1) of this Act.
- (3) In this section and the Schedule of the Fencing of Swimming Pools Act 1987,—  
**fence** includes any part of a building, and any gate or door, that forms part of a fence  
**fencing** means any barrier or barriers used to enclose a pool (or an immediate pool area) so as to restrict or prevent access to the pool.

#### **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 Relevant clauses of the Building Code currently in force:

**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<sup>10</sup>**

**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—

- (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.

---

<sup>10</sup> The limits on application only apply to *small heated pools*

A.3 Relevant sections of the Building Code that were current at the time the pool was constructed:

### **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**

**F4.3.1** 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.

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

#### *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.

**F4.3.4** Barriers shall:

- (a) Be continuous and extend for the full height of the hazard,
- (b) Be of appropriate height,
- (c) Be constructed with adequate rigidity,
- (d) Be of adequate strength to withstand the foreseeable impact of people and, where appropriate, the static pressure of people pressing against them,
- (e) Be constructed to prevent people from falling through them, and
- (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.

#### *Limits on application*

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

A.4 Relevant sections and The Schedule to the Fencing of Swimming Pools Act 1987 (repealed 1 January 2017):

## **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

**gates or doors** does not include any door to which clause 11 of the Schedule applies

**immediate pool area** means the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool

## **5 Exempted pools**

Nothing in this Act shall apply in respect of—

...

(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:

...

## **8 Obligations of owner and persons in control of pool**

(1) Every owner of a pool to which this Act applies shall ensure that, except as provided in any exemption granted under section 6, 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.

## **Schedule 1**

### **Means of compliance for fences under FOSPA**

#### **9 Operation of Gates and Doors**

(1) Every gate or door shall be fitted with a latching device.

(2) Where the latching device is accessible from the outside of the fence only by reaching over the fence, gate, or door or through a hole in the fence, gate, or door, the latching device and the lowest point of any hole giving access to it shall be at least 1.2 metres above the ground on the outside of the fence.

(3) Where the latching device is otherwise accessible from the outside of the fence, gate, or door, the latching device shall be at least 1.5 metres above the ground on the outside of the fence.

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. Doors in Walls of Buildings

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.