



Determination 2009/76

Safety barriers for a swimming pool at 135B McLaren Falls Road, Tauranga



1. The matters to be determined

- 1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Building Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department. The applicants are Mr and Mrs Bilbe (“the applicants”) and the other party is the Western Bay of Plenty District Council carrying out its duties and functions as a territorial authority or a building consent authority (“the authority”).
- 1.2 The dispute between the parties relates to the decision of the authority to refuse to issue a code compliance certificate for a swimming pool. The reason given by the authority for the refusal was that ‘the sliding doors giving access to the pool area from the dwelling are non compliant with the Swimming Pools Fencing Act 1987’.
- 1.3 I am of the opinion that the resolution of the dispute relies on the determination of the code compliance of the barrier, and I therefore must determine whether the pool barrier, which includes sliding doors, complies with Clause F4 “Safety from falling” of the Building Code² (Schedule 1, Building Regulations 1992).

¹ The Building Act 2004 is available from the Department’s website at www.dbh.govt.nz.

² The Building Code is available from the Department’s website at www.dbh.govt.nz.

1.4 Therefore, I take the view that the matters for determination, in terms of sections 177(a) and 177(b)(i) are:

Matter 1: The code compliance of the pool barrier

Whether the pool barrier, which includes sliding doors, complies with Clause F4 of the Building Code

Matter 2: The refusal to issue the code compliance certificate

Whether the authority was correct to refuse to issue the code compliance certificate for the swimming pool.

1.5 In making my decision I have not considered any other aspects of the Building Act or of the Building Code.

1.6 In this determination, for the purposes of discussing the legislation, solutions, and standards relevant to this determination, I will refer to the following:

- The Building Act 2004 (“the Building Act”), with its sections referred to as sections of the Building Act
- The Fencing of Swimming Pools Act 1987 (“the FOSP Act”), with its sections referred to as sections of the FOSP Act
- Clause F4 Safety from Falling of the Building Code, referred to as Clause F4
- The Schedule to the Fencing of Swimming Pools Act (“the Schedule”), with its clauses referred to as clauses of the Schedule

2. The background

2.1 The authority issued the first building consent (number 74498) for a house that included decks and pool fences on 3 April 2006. A note on the swimming pool as located on the consented plan stated “pool construction by separate contractor and separate building consent”. A second building consent (number 76938) was issued on 13 June 2007 for the swimming pool.

2.2 An amendment to the first building consent was issued on 3 September 2007, which was for changes to the decks in the pool area. The building work was completed in accordance with both the first and second building consents.

2.3 The authority completed 12 inspections of the house, decking and pool fencing built under the first consent and seven inspections of the pool constructed under the second building consent.

2.4 When the work in both building consents was completed, the authority made a final inspection of both the house and pool construction on 16 April 2008.

2.5 The authority issued a code compliance certificate on 3 June 2008 for the first building consent.

2.6 On 8 July 2008, the authority wrote to the applicants about the second building consent and stated:

The sliding doors giving access to the pool area from the dwelling are non complying with the Swimming Pool Fencing Act 1987.

Note: An application to [the authority] can be made for consideration of an exemption [for the sliding doors] or you can apply for a determination through the [Department].

2.7 The application for a determination was received by the Department on 9 March 2009.

3. The pool barriers

3.1 The relevant parts of the house and the swimming pool, as detailed in the first building consent, are shown in Figure 1.

3.2 The pool area is enclosed by a 1.2 metre high steel fence and gate at both ends of the swimming pool and a 1.2 metre high external pool wall at the garden side of the swimming pool. There is no dispute that the fence, gate, and wall comply with Clause F4.

3.3 The house side of the swimming pool is enclosed by the external walls of the house, which include three sliding glass doors (“the sliding doors”), which form part of the pool barrier.

3.4 The sliding doors consist of:

Door D02 opening from the living area, which are dual doors at 1.7 metres wide and 2.4 metres high

Doors D03 and D04 opening from separate bedrooms, which are single doors.

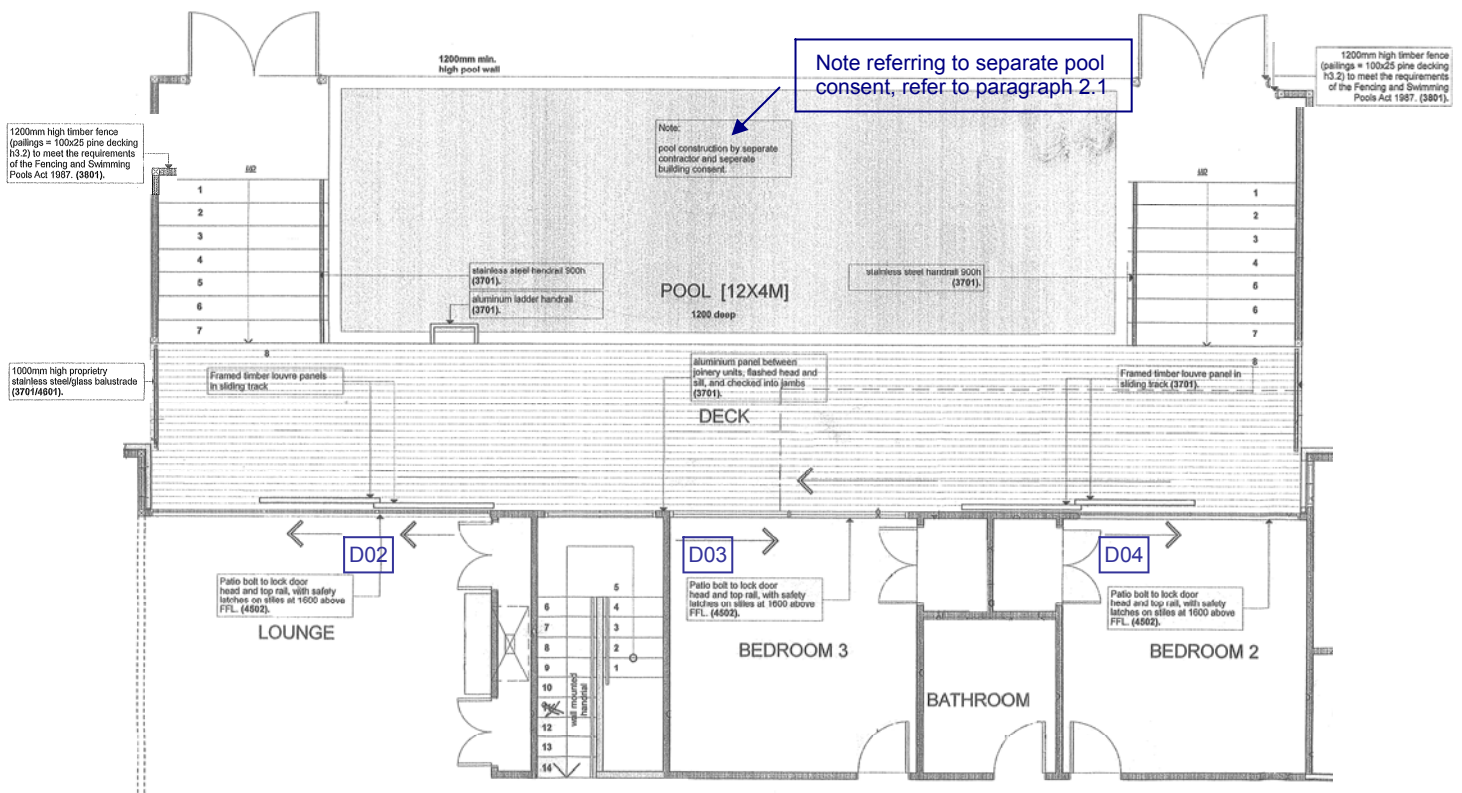


Figure 1: the house and swimming pool as detailed in the first building consent

4. The submissions

4.1 In a document accompanying the application to the Department, the applicants submitted that:

- a code compliance certificate had been issued for the first building consent that showed the swimming pool, and which included the sliding doors. The requirements of the FOSP Act have been met, as the pool barrier complies with Clause F4.
- The sliding doors have been fitted with lockable push locks (“the push locks”) at 1.6 metres above floor level, and can be locked at the 100mm open position. The sliding doors weigh over 90 kilograms each, so cannot be fitted with self-closing or self-latching mechanisms as they are too heavy.

4.2 The applicants supplied copies of:

- the original and amended drawings
- correspondence between the authority and the applicants
- a set of photographs showing views of the swimming pool from the house
- correspondence and details on the sliding door from the door manufacturer.

4.3 Copies of the submissions and other evidence were provided to the parties.

The draft determinations and the hearing

4.4 The timeline of the draft determinations and the hearing is as follows:

- The first draft determination was issued to the parties for comment on 9 April 2009
- The second draft determination was issued to the parties for comment on 15 May 2009
- The hearing was held in Tauranga on 8 June 2009
- The third draft determination was issued to the parties for comment on 20 July 2009.

The authority’s position

4.5 The authority accepted the draft determinations, and in response to the second draft determination commented that they had modified their position on accepting proposals that use NZS 8500³ as a solution, and ‘if an application for an exemption under the [FOSP] Act was received setting out that the requirements of Clause 2.3.2 (probably those in paragraph (f)) would be put in place, [authority] staff would not recommend to the Committee that the application be declined.’

4.6 At the hearing, the representative of the authority explained that their interpretation of the FOSP Act had changed since the building consent was issued, and it considered that to issue a code compliance certificate for a swimming pool that did not meet the requirements of the FOSP Act would be negligent.

³ New Zealand Standard NZS 8500: 2006 Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs

The applicants' position

- 4.7 The applicants did not accept any of the draft determinations. The applicants made submissions in response to each of the draft determinations, and I have summarised the points raised in those submissions in the following table:

Date	Applicants' comments
17 April 2009	The Building Code at the time 'specifically pointed to the FOSP Act as a guide to what restrictions are acceptable.' Furthermore, the Building Code does not specify how the restriction of access is to be achieved, or the number of measures that need to be in place.
17 April 2009	Sliding doors are excluded under Clause F4.3.5(a), and in the absence of any other guidelines, the solutions outlined in Clause 11 of the Schedule and the document titled 'The Fencing of Swimming Pools Act 1987 Guidelines for Territorial Authorities' ⁴ would have been used by the designers and the authority as a basis to meet F4/AS1. NZS 8500 was not relevant at the time the sliding doors were consented and NZS 8500 was not a compliance document.
17 April 2009	There is no requirement for additional means of restricting access. The push locks are additional and were installed in order to restrict access, and would be superfluous if the doors did not form part of the pool barrier. The building arrangement is such that access to the pool area by a small child would require a series of deliberate actions.
19 May 2009	The swimming pool must be considered to be part of the first building consent, it was only the construction of the swimming pool that was completed under the second building consent and the authority considered the fencing and pool barriers as a part of the first building consent.
19 May 2009	The building work had to be completed in accordance with the consented plans.
19 May 2009	The later standards of NZS 8500 are prudent measures and will provide other layers of protection, however, nothing can be done until the determination is finalised.
7 August 2009	Section 93 and 94 must be considered in the determination as this was requested in the application for determination.
7 August 2009	Changes to the Building Code and the change of the interpretation of the FOSP Act can not affect the issue of the code compliance certificate as the consent was assessed as meeting Clause F4 at consent stage. The authority was satisfied the sliding doors met the Building Code at the time of consent, therefore the sliding doors already comply with the Building Code. The level of protection described by Clause 11, which is stated to be compliant with the FOSP Act under the exemption, must then be considered to be providing the same level of protection as a complying pool barrier. Thus, these sliding doors provide the same level of protection as a complying pool barrier.
7 August 2009	'The code compliance certificate states "the specified systems are

⁴ The Fencing of Swimming Pools Act 1987 Guidelines for Territorial Authorities, dated August 1999, published by the Department of Internal Affairs

	capable of performing to the performance standard set out in the building consent". It does not say that they 'must perform' but that they are 'capable of performing'. The locks on these doors are capable of restricting access to young children.'
7 August 2009	... 'then were we not to build the full pool but instead replace it with a paddling pool say 12m x 4m x just 300mm in depth, we would not have needed to submit a separate building consent application for a paddling pool construction. Therefore a separate code compliance certificate would also not be needed. However, it is necessary to meet the Building Code and have compliant fencing. Therefore the requirement for the fencing is on the first consent.'

4.8 At the hearing, the applicants explained that the building work had been completed in accordance with the consented documents, and now, by no fault of their own, they were in the position that they were unable to obtain a code compliance certificate. The applicants also explained that they would undertake to provide additional layers of protection to the swimming pool, but they felt that the authority was obliged to issue the code compliance certificate.

4.9 On 7 September 2009 I received notification from the applicants that they had undertaken work to install additional safety features. In making my decision, I have not considered this work, as the work was completed after the application for determination was made. The determination considers the decision of the authority to refuse to issue the code compliance certificate, and the building work as it was at that time. I therefore leave it up to the applicant to submit this information to the authority to consider, as discussed in paragraph 9.1.

5. The legislation and the acceptable solution

5.1 The Building Code

5.1.1 The relevant provisions of the Building Code are:

Provisions	Limits on application
F4.3.3 Swimming pools having a depth of water exceeding 400 mm, shall have barriers provided.	Performance F4.3.3 shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.
F4.3.4 Barriers shall: (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,	Performance F4.3.4(f) shall not apply to any pool exempted under section 5 of the Fencing of Swimming Pools Act 1987.

(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.	
<p>F4.3.5 Barriers to swimming pools shall have in addition to performance F4.3.4:</p> <p>(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</p>	

5.2 The Acceptable Solution

5.2.1 The Acceptable Solution, F4/AS1 (second edition) states:

3.0 Swimming pool barriers

3.1 Fencing

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.

5.3 The FOSP Act

5.3.1 The relevant provisions of the FOSP Act are:

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) of this section, that such an exemption would not significantly increase danger to young children.
- (2) In granting an exemption under subsection (1) of this section, the territorial authority may impose such other conditions relating to the property or the pool as are reasonable in the circumstances.

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 of this Act, the pool, or some or all of the immediate pool area including all of the pool, is fenced by a fence that complies with the requirements of the building code in force under the Building Act 2004 in respect of swimming pools subject to this Act at all times when this Act applies in respect of the pool.

12 Delegation of powers to committees of councillors

The territorial authority may delegate its powers and functions under section 6 and clause 11 of the Schedule to any committee of the territorial authority appointed under clause 30 of Schedule 7 of the Local Government Act 2002 that comprises only members of the territorial authority; but may not delegate those powers and functions to any committee that has any members who are not members of the territorial authority or to any officer of the authority.

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

5.4 The Schedule to the FOSP Act

5.4.1 The relevant clauses of the Schedule include:

9 Operations of gates and doors

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

10 Every gate or door shall be fitted with a device that will automatically return the gate or door to the closed position and operate that latching device when the gate or door is stationary and 150mm from the closed and secured position.

11 Doors in walls of buildings

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.

Interpretation of the legislation**6. Discussion****6.1 The relationship between the FOSP Act and the Building Code**

6.1.1 The authority has issued a code compliance certificate for the first building consent, but refused to issue a code compliance certificate for the second building consent. The authority cited clause 11 of the Schedule as the reason for the refusal (refer to paragraph 5.4).

6.1.2 I have no jurisdiction under the FOSP Act, but I note that it does not specifically require that fencing (including gates and doors) must comply with the 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. The FOSP Act also provides in effect that fencing complying with the Schedule is deemed to comply with the Building Code. Exemptions granted under section 6 of the FOSP Act are exemptions ‘from some or all of the requirements of the FOSP Act.

6.1.3 In the case considered by the High Court of Waitakere City Council v Hickman⁵, the Court held:

Under the Schedule to the [FOSP] Act for gates and doors in buildings forming part of the fence, the requirements of clauses 8 to 10 apply unless and to the extent they are exempted and the required locking device is fitted. There is no specific exemption under the Schedule for sliding doors. All doors are treated alike and may be subject to exemption under clause 11.

⁵ Waitakere City Council v Hickman 1/10/2004, Randerson J, HC Auckland CIV 2003-404-7266

6.1.4 Sections 22 and 23 of the Building Act provide, in effect, that building work complying with a compliance document must be accepted as complying with the relevant provision of the Building Code, however that is not the only means of establishing compliance. 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 that case there would be no need for an exemption under section 6 of the FOSP Act.

6.2 Exemption under the FOSP Act

6.2.1 Any exemption of clause 11 of the Schedule can be granted if the territorial authority is satisfied that compliance with clauses 8 to 10 of the Schedule is ‘impossible, unreasonable, or in breach of any other Act...’. The FOSP Act provides that an authority has a general power of exemption under section 6, provided that such an exemption “would not significantly increase danger to young children” and section 6(2) allows the authority to impose conditions. The authority has invited the applicants to apply for an exemption under the FOSP Act for the sliding doors.

6.2.2 I repeat that I as have no jurisdiction under the FOSP Act the above remarks are not binding.

Matter 1: The code compliance of the barrier

7. Discussion

7.1 The swimming pool and pool barrier, including the three sets of sliding doors forming a part of the pool barrier, is new building work and the pool barrier must comply with Clause F4 of the Building Code.

7.2 As to whether the sliding doors from the house to the pool area comply with the Building Code, I take the view that:

- (a) The sliding doors come within the exemption of Clause F4.3.5(a) and are therefore not required to be self-closing and self-latching.
- (b) Nevertheless, the sliding doors are required to comply with Clause F4.3.4(f) and ‘restrict the access of children under 6 years of age’.
- (c) The means of doing so can include self-latching and self closing, but that does not prevent the use of other means.

7.3 Determination 2006/103 took the view, that under section 23 of the Building Act, compliance with an acceptable solution is not the only means of complying with the corresponding provision of the Building Code. I concur with that view and because F4/AS1 does not consider how sliding doors can be made compliant, any approved solution must be considered as an alternative solution to the Building Code.

7.4 In this case, there are three sliding doors from three separate rooms that open onto the immediate pool area. The unlocking, opening, or leaving open of one of the doors would mean a breach of the pool barrier. Although I acknowledge the weight of the doors may be difficult for children to operate, the effectiveness of the pool barrier relies on the behaviour of the people using the three doors from the three separate rooms in the house. Therefore, I am of the view that the sliding doors with their high level locks, do not meet the requirement of Clause F4.3.4(f) to restrict the access of children.

- 7.5 For the reasons set out above I conclude that the pool barrier, which includes sliding doors, does not comply with the Building Code.

Matter 2: The refusal to issue the code compliance certificate

8. Discussion

- 8.1 In order to consider the matter of the refusal to issue the code compliance certificate for the second building consent, I am of the view that I must take into account the circumstances of the two consecutive building consents, and consider whether the building consents were correctly granted.
- 8.2 The building work under the first building consent clearly includes the elements that were to make up the barrier to the swimming pool. The consented drawings clearly detail the swimming pool and its dimensions, and provide the details of the sliding doors and their push locks, as well as noting the inclusion of certain features of the pool barrier.
- 8.3 I am of the view that splitting the construction of the house and swimming pool into two building consents has made the compliance of the pool barriers unnecessarily complex. I acknowledge that the intention of the applicants was to construct compliant pool barriers as a part of the building work of the first building consent. I also acknowledge that the consents were only split because the construction of the swimming pool itself was to be completed by a separate contractor.
- 8.4 While I acknowledge the applicants' contention that the plans of the first consent signalled their intention to build a swimming pool, I take the view that it was the construction of the pool itself that generated the requirement for the barrier to the pool. In this respect I agree with the applicant that if they were to construct a 300mm deep paddling pool (refer to paragraph 4.7), then a building consent would not have been required. I also note that pool barriers would then also not have been required if a padding pool was installed.
- 8.5 Taking this into account, and my finding that the barrier to the pool area, including the sliding doors, does not comply with Clause F4, I am of the view that the second building consent was issued incorrectly as it was granted for the construction of the pool and required to show how the pool barriers would comply with the Building Code.
- 8.6 Given that the building work has now been completed and the authority's decision to issue the second building consent relied upon, it would be impractical to reverse the authority's decision to issue the building consent. Therefore, in the circumstances, the authority has now adopted the correct approach in refusing to issue the code compliance certificate, given that it wrongly issued the second building consent in the first place.
- 8.7 The consequences of the authority wrongly issuing the second building consent, unfortunately now fall on the owner. The owner has ongoing obligations under the FOSP Act in respect of the ensuring the pool is properly fenced, and to bring the pool barrier into compliance with the Building Code will now need to apply for an amendment to the second building consent.

8.8 I accept that the task of achieving compliance at this stage is more difficult than might have otherwise been the case, however, the fact that the work has been completed, cannot, of itself, change my view of the situation.

9. What is to be done now?

9.1 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 authority to accept or reject. In particular, a means for restricting the access of children under the age of six will be required, given that the sliding doors are not self-closing and self-latching. I suggest the applicant seeks an amendment to the second building consent.

9.2 Clause F4.3.5 allows solutions to maintaining a pool barrier for sliding doors, other than sliding doors that are self-closing and self-latching. It provides flexibility for compliance with Clause F4, keeping in mind that the Schedule provides only one possible solution and the Building Code is a performance-based document. It is for the authority to consider and accept an appropriate alternative solution, with the Schedule setting the safety standard.

9.3 As discussed in Determination 2007/79, until NZS 8500 is cited in the compliance document for Clause F4, it does not have the legal status of a compliance document. However NZS 8500 was approved by the Standards Council on 3 November 2006 to be a New Zealand Standard and as such must command respect as representing the consensus of the major national bodies represented, arrived at after a process of public consultation. I note that NZS 8500 had not been issued at the time the first building consent was issued; however, the authority may well compare any solutions proposed by the applicants with those offered in NZS 8500. The above remarks must not be taken to mean that NZS 8500 is an acceptable solution for Clause F4. That cannot be the case unless and until F4/AS1 is formally amended in accordance with section 29 of the Building Act.

9.4 As noted in paragraph 6.1.2, I have no jurisdiction under the FOSP Act, and therefore it is up to the parties to agree on the timing of any exemption application, and the timing of this action relative to any application to amend the consent.

10. The decision

10.1 In accordance with section 188 of the Act, I hereby determine that the pool barrier, which includes sliding doors, does not comply with Clause F4.

10.2 I also confirm the authority's decision to refuse to issue the code compliance certificate, based on the second building consent being incorrectly issued.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 11 September 2009.

John Gardiner
Manager Determinations