



## Determination 2011/112

# Compliance of a pool barrier with a gate opening inwards to the immediate pool area at 21 Bendigo Grove, Wellington

### 1. The matter to be determined

1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004<sup>1</sup> (“the Act”) made under due authorisation by me, John Gardiner, Manager Determinations, Department of Building and Housing (“the Department”), for and on behalf of the Chief Executive of that Department.

1.2 The parties to the determination are:

- R Ashcroft and L Eastman, the owners of the property (“the applicants”)
- Wellington City Council, carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”).

1.3 The determination arises from a dispute between the parties about the Building Code compliance of a gate forming part of a barrier to a spa pool. The authority has refused to issue a code compliance certificate for the pool barrier, because the gate opens inwards into the immediate pool area.

1.4 The matters to be determined<sup>2</sup> are whether the gate complies with clause F4 of the Building Code, and whether the authority was correct to refuse to issue the code compliance certificate.

1.5 In this determination:

- The Building Act 2004 and its sections are referred to as sections of the Act
- The Fencing of Swimming Pools Act 1987 and its sections are referred to as sections of the FOSP Act (“the FOSP Act”).

---

<sup>1</sup> The Building Act 2004, Building Code, compliance documents, past determinations and guidance documents issued by the Department are all available at [www.dbh.govt.nz](http://www.dbh.govt.nz) or by contacting the Department on 0800 242 243

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

- 1.6 In this determination, I will refer to the following legislation and standards, the relevant parts of which are set out in Appendix A.
- Clause F4: Safety from Falling of the Building Code, referred to as Clause F4.
  - The Schedule to the FOSP Act, referred to as the Schedule, with its clauses referred to as clauses of the Schedule.
  - NZS 8500: 2006: Safety Barriers and Fences around Swimming Pools, Spas and Hot Tubs, referred to as NZS 8500.

- 1.7 In making my decision, I have considered the submissions of the parties and other evidence in this matter. I have not considered any other aspects of the Act or of the Building Code.

## **2. The background and building work**

- 2.1 The spa pool was constructed as part of larger building works to erect a dwelling on the applicants' property. The spa pool and its barrier are located on the north-eastern corner of a paved courtyard, which can be accessed only through the applicants' house. The courtyard is unfenced and has an approximate 1m drop off its eastern end.
- 2.2 Three sides of the barrier to the spa pool are formed by concrete block walls with the glass barrier forming the barrier between the spa pool and courtyard. The glass barrier includes a self-closing and self-latching pool gate with hinges fixed to the adjacent concrete block wall. The gate opens inwards into the immediate spa pool area. I note that there is no dispute between the parties about the adequacy of the barrier, other than the fact that the gate opens inwards.
- 2.3 The authority issued a building consent (No. 158586) for the building work including the pool barrier on 21 May 2007. An addendum to the consent required all gates and doors giving access to the pool area to comply with clauses 8, 9 and 10 of the Schedule. Building work commenced in 2008.
- 2.4 On 23 September 2010, the authority carried out a final inspection of the building work. In its inspection report, it advised that the spa pool needed to comply with the FOSP Act and set out various ways this could be achieved. It advised that the application for a code compliance certificate would be 'put on hold' until compliance was achieved.
- 2.5 On 31 January 2011, the authority carried out a further inspection of the pool and barrier, noting in its inspection report that they did not comply with the FOSP Act because the pool gate opened inwards. This was confirmed in a letter to the applicants dated 4 February 2011.
- 2.6 There followed email correspondence between the parties which discussed the possibility of the applicants applying for an exemption under section 6 of the FOSP Act. The authority indicated that it would not support such an application because 'there is no reason for the gate not to comply'; if the gate opened inwards and failed to latch properly then it would give children 'unrestricted access to the pool'.

- 2.7 On 1 July 2011, the applicants wrote to the authority to make a ‘formal application for an exemption in relation to the gate to the spa pool’. The applicants asserted that an exemption ‘would not significantly increase danger to young children’, and gave three reasons why they believed an exemption was justified.
- Because of the presence of other risks in the courtyard area, young children would always be supervised when in the area.
  - The risk foreseen by the authority would only occur where there was an unsupervised child in the courtyard area, the spa pool cover was unsecured and the gate closing mechanism failed. This combination of circumstances was ‘most improbable’.
  - If the gate was to open outwards, it would be essential to have a gate stop to prevent the gate being damaged by the wind, and this stop would present a ‘very real and serious risk’ to all people using the courtyard of tripping and falling off the end of the courtyard.
- 2.8 Further correspondence then passed between the parties, setting out their respective positions and discussing (among other things) the relationship between the FOSP Act and the Building Code.
- 2.9 On 1 September 2011, the authority issued a notice to fix for the pool barrier on the grounds that it did not comply with Clause F4. The notice required the applicants to ‘reinstate the gate to open away from the spa pool’.
- 2.10 On 21 September 2011, the applicants wrote to the authority advising that they were no longer pursuing their application for an exemption, on the grounds that even though the pool gate did not comply with the schedule of the FOSP Act it did comply with the Building Code as Clauses F4.3.4 and F4.3.5 contain no specific requirement for pool gates to open outwards. The applicants requested that a code compliance certificate be issued.
- 2.11 The authority replied on 27 September 2011 stating that a gate that opened inwards did not comply with Clauses F4.3.4(d) to (f) as:
- A gate that may fail to latch will not withstand the impact of a person or when pressure of people pressing against it is applied and therefore will not prevent a child from falling through the barrier.
- 2.12 On 12 October 2011, the applicant wrote advising the authority of their intention to apply for a determination, and the Department received the application for a determination on 26 October 2011.

### **3. The submissions**

- 3.1 With their application, the applicants enclosed:
- copies of the site inspection reports dated 23 October 2010 and 31 January 2011
  - copies of correspondence between the parties, including photographs of the pool barrier and courtyard.

- 3.2 The authority acknowledged receipt of the application on 3 November 2011. With its acknowledgement the authority enclosed:
- a copy of the building consent relating to the building works
  - a copy of the notice to fix dated 1 September 2011
  - copies of email correspondence between the parties.
- 3.3 A draft determination was sent to the parties on 28 November 2011. The authority accepted the draft determination on 1 December 2011.
- 3.4 The applicants did not accept the draft determination. In a submission dated 12 December 2011, they raised three main points about the draft:
- the barrier's compliance with Clause F4: the applicants contended that it was compliant
  - the authority's refusal to issue a code compliance certificate for the dwelling: the applicants were of the view this could be issued independently of the code compliance certificate for the barrier
  - the authority's refusal to grant an exemption under the FOSP Act for the spa pool: the applicants requested that the determination consider whether or not it would be reasonable for the authority to grant such an exemption.
- 3.5 I have taken the applicants' submissions on the draft into account in making this final determination, and have responded to their specific points at the relevant parts in the discussion.

## **4. Discussion**

### **4.1 The relationship between the FOSP Act and the Building Code**

4.1.1 Section 8(1) of the FOSP Act requires pools to be protected by a fence that complies with the requirements of the Building Code<sup>3</sup>. Clause F4 of the Building Code requires that pools<sup>4</sup> have barriers. The barriers are required to achieve the performance requirements set out in Clause F4.

4.1.2 There are three ways to provide a barrier solution that meets the requirements of the Building Code and the FOSP Act.

#### **1. Propose a solution that meets the requirements of the Schedule**

The Schedule has the status of a compliance document<sup>5</sup>, so any solution that meets the requirements of the Schedule is deemed to comply with the Building Code. The Schedule is a prescriptive solution and is one way, but not the only way, of complying with the Building Code.

---

<sup>3</sup> Other than those pools exempted under section 6 of the FOSP Act.

<sup>4</sup> With a depth of water exceeding 400mm under Clause F4.3.3 of the Building Code.

<sup>5</sup> Under section 13B of the FOSP Act.

## **2. Propose an alternative solution that meets the requirements of Clause F4**

The Building Code is performance based and sets out the minimum performance requirements. It does not specify how to achieve this performance (there are no detailed requirements for design and construction).

The safety measures set out in NZS 8500 could be used to inform an alternative solution. While NZS 8500 is not referenced as a means of compliance in the Building Code, the standard was approved by the Standards Council and as such has significance as a means of providing robust solutions. In Determination 2011/071 I accepted that a solution provided by NZS 8500 also met the requirements of Clause F4.

An exemption under section 6 of the FOSP Act is not necessary if the solution complies with the Building Code (refer to 3).

## **3. Propose a solution that requires an application for an exemption under section 6 of the FOSP Act.**

Although I do not have jurisdiction under the FOSP Act, I note that a territorial authority may grant a special exemption under section 6 of the FOSP Act. In considering an exemption, a territorial authority is required to be satisfied 'that such an exemption would not significantly increase danger to young children'.

A solution incorporating an exemption would also require a waiver of Clause F4, as the requirements of Clause F4 are not met in full.

In the current case, the authority has indicated that it will not support an application for an exemption.

## **4.2 The compliance of the spa pool barrier with the Building Code**

- 4.2.1 The matter for consideration is whether the spa pool barrier complies with Building Code Clause F4. The Schedule of the FOSP Act is a means of establishing the compliance of pool barriers with Clause F4. The current barrier does not comply with Clause 8 of the Schedule because the gate, which forms part of the barrier, opens inwards towards the pool.
- 4.2.2 The question therefore becomes whether the gate complies with Clause F4 as an alternative solution. The Building Code is performance-based and any proposed alternative solution must comply with, or exceed, the required performance requirements.
- 4.2.3 The performance requirements of Clause F4 that is of particular relevance in the current case is:
- F4.3.4(f), which requires that barriers shall 'restrict the access of children under 6 years of age to the pool or the immediate pool area'.
- 4.2.4 The Schedule is an Acceptable Solution and is a prescriptive design solution that provides one way of complying with the Building Code. One way of evaluating compliance with the Building Code is to compare the design against the Acceptable Solution. The solution provided in Clause 8 of the Schedule is for a pool gate to open outwards.

- 4.2.5 The safety measures set out in NZS 8500 provides another set of solutions that could be used to inform a solution. NZS 8500 makes a clear distinction between the direction in which gates and doors forming part of a pool barrier are to swing.

Clause 3.4.1 of NZS 8500 states that:

Gates shall be hung so that they only swing outwards away from the pool area.

- 4.3 In evaluating the design as submitted I need to compare the levels of safety achieved in the design with the relevant provision of Clause F4 and confirm (or otherwise) whether equivalence has been achieved, giving due regard to the abovementioned guidelines.
- 4.3.1 The reason that both the Schedule and NZS 8500 require pool gates to open outwards is that if a gate fails to close properly or the automatic latch on it malfunctions, a gate that opens inwards towards a pool will not withstand the pressure of people leaning or pushing against it and will not prevent children gaining access to the pool area. Accordingly, such a gate would not comply with the requirements of the Building Code. That a pool gate will on occasion fail to latch or close properly is not a rare or unforeseeable occurrence; even a robust well-designed gate may on occasion fail to close. Requiring gate to open outwards minimises the risk associated with such an occurrence.
- 4.3.2 In their submissions, the applicants have stated that just because an alternative solution does not comply with NZS 8500 does not mean that it does not meet the requirements of the Building Code. This is correct. However, as stated in paragraph 4.1.2, although NZS 8500 does not have the status of a compliance document, it represents the current best practice for the safe fencing of pools and can assist in assessing the robustness and potential compliance of proposed alternative solutions. Accordingly, the solutions the standard describes can be used to inform (but not dictate) what is required to meet the performance requirements of the Building Code, particularly as they relate to pool safety.
- 4.3.3 In the current case, the gate on the applicants' pool barrier opens inwards. Should it fail to close or latch, any child (or other person) leaning or pushing against it would gain easy access to the immediate pool area. This is a reasonably foreseeable circumstance. The risk of it occurring would be lessened if the swing of the gate were reversed, or if there were other additional safety measures put in place. I also note that the design does not have any compensating features to compensate for the gate opening outwards. For these reasons I find that, as it is currently constructed, the pool barrier does not comply with Clause F4.3.4(f) of the Building Code.

#### **4.4 Management of the pool area**

- 4.4.1 In their correspondence with the authority, the applicants have stated that no child will be in the courtyard area where the pool is located without adult supervision. While I acknowledge the applicants' intention, this is a management practice and is reliant on the behaviour of the people using the courtyard and spa pool. The Department's approach to the status of management practices has been well established in other determinations. In essence, buildings must comply with the performance criteria in the Building Code in their intended use, and this includes

both current and future owners of the property. As a result, management practices cannot be used to achieve compliance (except in limited circumstances dictated by statute), because current owners cannot vouch for the behaviour of future ones.

#### **4.5 The code compliance certificate**

- 4.5.1 In their submissions, the applicants have asked that the authority issue a code compliance certificate for the dwelling independently of the code compliance certificate for the spa pool barrier.
- 4.5.2 A single building consent (No. 158586) has been applied for and issued in respect of the proposed work: the spa pool forms one part of the consented work. Section 94 of the Act says an authority ‘... must issue a code compliance certificate when it is satisfied, on reasonable grounds, – ... that the building work complies with the building consent ...’. The Act does not provide for the issue of more than one code compliance certificate in respect of a single building consent.
- 4.5.3 The applicants have noted that the dwelling has a ‘separate SR number’ to support their position. The SR number is an internal operational coding applied by the authority. It does not influence the scope of the building consent or any code compliance certificate issued in relation to it.

#### **4.6 Exemption under the FOSP Act**

- 4.6.1 The applicants have requested that I consider whether it would be reasonable for the authority to grant an exemption for the pool under section 6 of the FOSP Act. The decision to grant an exemption in respect of a particular pool is made by a committee of the authority’s councillors. As already stated, I have no jurisdiction under the FOSP Act, and cannot make any comment how such an application might be viewed.

#### **4.7 Conclusion**

- 4.7.1 Taking the above into account, I conclude that the spa pool barrier with the gate opening inward to the immediate pool area does not comply with Clause F4, and that the authority was correct to refuse to issue a code compliance certificate for it.

### **5. What is to be done?**

- 5.1 It is not for me to say how compliance is to be achieved. This is for the applicants to propose and for the authority to accept or reject. However, I note that parties have discussed the possibility of reversing the swing of the gate so that it opens outwards and installing a stop to prevent it being damaged by wind. This seems to me a practical solution. The applicants have expressed concerns about a gate stop creating a tripping hazard. I note that if the stop were located on the edge of the terrace, which appears possible from the photos, it would minimise this risk as people are unlikely to be walking in this area.

- 5.2 Alternatively, if the applicants wish to retain the inward swing of the gate, it will be incumbent on them to install additional safety measures to ensure that the performance criteria in Clause F4 are met; NZS 8500 may be useful in this regard.

## **6. Decision**

- 6.1 In accordance with section 188 of the Act, I determine that the spa pool gate does not comply with Clause F4 of the Building Code, and I confirm the decision of the authority to refuse to issue a code compliance certificate for the building work.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing on 22 December 2011.

John Gardiner  
**Manager Determinations**



## Appendix A: The legislation, the Acceptable Solution, and NZS 8500

### A1. Clause F4

The Building Code requires:

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

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 the age of 6 years to the pool or the immediate pool area,
- (g) Restrict the passage of children under the age of 6 years of age when provided to guard a change of level in areas likely to be frequented by them

...

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 150mm 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, and
- (b) No permanent objects on the outside of the barrier that could provide a climbing step.

### A2. The FOSSP Act states:

#### **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.

#### **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.

#### **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:

A3. The Schedule of the FOSP Act requires

8 Gates and doors

Every gate or door shall be so constructed as to comply with the relevant requirements of clauses 1 to 7 of this Schedule, 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:
- (c) When lifted up or pulled down the gate or door does not release the latching device, come off its hinges, or provide a ground clearance greater than 100 mm.

A4. NZS 8500 requires:

**3.4 Gates and fittings**

3.4.1 Direction of opening

Gates shall be hung so that they only swing outwards away from the pool area.