



## Determination 2020/004

### Regarding the compliance of a pool barrier consisting of an automatic cover and the decision to issue a code compliance certificate for the pool at 78 Mountain View Road, Queenstown



#### Summary

This determination considers the authority's decision to issue a code compliance certificate for an automatic pool cover as a pool barrier. The determination discusses whether a special exemption was granted under the Fencing of Swimming Pools Act 1987 and the compliance of the automatic pool cover as a pool barrier with Clause F4 Safety from falling as the relevant Building Code clause at the time the building consent was issued.

## 1. The matter to be determined

- 1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 ("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<sup>1</sup>.
- 1.2 The parties to the determination are:
  - Queensland Lakes District Council ("the authority") carrying out its duties as a territorial authority or building consent authority, and who applied for the determination
  - the current owners of the property, N Watanabe and L Lloyd, ("the current owners"), represented by a lawyer ("the current owners' lawyer").

<sup>1</sup> The Building Act and Building Code (Schedule 1 of the Building Regulations 1992) are available at [www.legislation.govt.nz](http://www.legislation.govt.nz). Information about the legislation, as well as past determinations, compliance documents and guidance issued by the Ministry is available at [www.building.govt.nz](http://www.building.govt.nz).

- 1.3 Ownership of the property changed during the course of the determination process. The previous owner owned the property at the time the application for determination was made, so was originally party to the determination and was represented by a lawyer (“the previous owner’s lawyer”). The current owners were made party to the determination and given the opportunity to make submissions once the Ministry was informed of the change in ownership.
- 1.4 This determination arises from a failed inspection<sup>2</sup> of a residential swimming pool. The automatic pool cover (“the pool cover”) was approved as a barrier to the pool in a building consent and the authority has previously issued a code compliance certificate for that consent. Despite this, the authority is now of the view that the pool cover does not comply with section 162C<sup>3</sup> of the Act as a barrier and the code compliance certificate was issued in error. The previous owner disputes that the pool cover does not comply to the extent required by the Act.
- 1.5 The matter to be determined<sup>4</sup> is whether the authority was correct to issue the code compliance certificate for the building work including the pool cover. In deciding this matter, I must consider whether the pool cover, without any other physical barrier to the pool, complies with the requirements of Building Code Clause F4 Safety from falling that was in force when the pool was constructed.
- 1.6 The previous owner’s lawyer is of the view that the pool cover was granted a special exemption under section 6 of the Fencing of Swimming Pools Act 1987 (“FOSPA”), and therefore was not required to comply with FOSPA or the Building Code in force at the time. Although decisions made under FOSPA are outside my jurisdiction, whether or not an exemption was granted is relevant to the authority’s decision to issue the code compliance certificate and the question of whether the barrier to the pool meets the requirements of section 162C of the Act by way of section 450B(2). I discuss the relationship between the Act and an exemption under section 6 of FOSPA in paragraph 4.2, and the particular circumstances of this case in paragraph 4.3.
- 1.7 In making my decision, I have considered the submissions of the parties and the other evidence in this matter. I have not considered any other aspects of the building work carried out under the same building consent, nor have I considered other aspects of the Act or Building Code beyond those required to decide on the matter to be determined.
- 1.8 Refer to Appendix A for relevant extracts from the legislation.

## 2. Background

- 2.1 On 27 May 1994, a designer (“the designer”) acting on behalf of the previous owner applied for a building consent for building work to construct an extension to an existing dwelling on site and which included the construction of an in-ground pool.
- 2.2 The submitted drawings note a “pool cover” with the specification stating:

Motorised swimming pool covers and recess to conceal below ground level including removable cover to allow maintenance. [One] cover at end of swimming pool and [one] at end of swimming lane.

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<sup>2</sup> Section 162D of the Act requires territorial authorities carry out inspections at least once every three years to ensure ongoing compliance of pool barriers to the extent required by section 162C.

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

<sup>4</sup> Under sections 177(1)(b) and 177(2)(d) of the Act.

- 2.3 On 2 June 1994 the authority sent a request for information, asking the previous owner to:
- Provide further information in regard to the pool cover which shall confirm that the cover meets the provisions of the NZBC Clause F4.3.4(f) - “restrict the entry of children under 6 years of age, when located in areas likely to be frequented by them”
- 2.4 On 7 June 1994 the designer responded to the request for information and included the following points (in summary):
- The pool cover is fully automatic with the controls in a locked cabinet.
  - The designer wished to apply for a “dispensation from the pool fencing act [sic] 1987” on behalf of the previous owner.
- 2.5 I take the designer’s and owner’s references to “dispensation” throughout to mean a special exemption under section 6 of FOSPA, and accordingly I use the term “exemption” in this determination.
- 2.6 The designer provided a copy of a document from the importer of the pool cover titled “reasons why automatic safety covers are a viable alternative to fencing” which referenced ASTM ES13-89<sup>5</sup> and appended to this a document titled “submission for dispensation” dated 1 August 1990.
- 2.7 There is a hand written note signed by an officer of the authority at the bottom of the designer’s letter of 7 June 1994, which states:
- After reading the manufacturers [sic] specifications I consider that the proposed pool cover being [sic] an acceptable solution in terms of fencing around a swimming pool
- 2.8 I have not seen a copy of the pool cover manufacturer’s installation specifications the officer has referred to. I note that the document from the importer referred to in paragraph 2.6 did not include any installation details or instructions.
- 2.9 The authority issued building consent BC930965 on 9 June 1994. The conditions of the consent included (among others):
- The installation of automatic swimming pool cover ... shall be installed in compliance with [the manufacturer’s] specifications
- 2.10 After a number of inspections between 30 June 1994 and 23 June 2004, the authority issued a code compliance certificate on 23 June 2004.

## **2.11 The 2017 amendments to the Act**

- 2.11.1 Prior to 1 January 2017, the legislation applicable to pool barriers was set by FOSPA and the requirement under the Act to comply with the Building Code Clause F4 Safety from falling. On 1 January 2017 FOSPA was repealed and the Building Act was amended to incorporate a set of special provisions for residential pools (sections 162A to 162E, and savings and transitional provisions 450A and 450B) and Clause F9 Means of restricting access to residential pools 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<sup>6</sup>.
- 2.11.2 Section 162C requires residential pools to have physical barriers to restrict access to pools by unsupervised children under five years of age, and sets out the extent to

<sup>5</sup> American Society for Testing and Materials ES13-89 is the Standard Specification for Safety Covers and Labeling Requirements for All Covers for Swimming Pools. Note: This standard was withdrawn in 1991 and, replaced by F1346 - Standard Performance Specification for Safety Covers and Labeling Requirements for All Covers for Swimming Pools, Spas and Hot Tubs.

<sup>6</sup> Under section 162A of the Act

which existing pools must comply. Section 162D requires territorial authorities to carry out inspections at least once every three years to ensure ongoing compliance with the requirements of section 162C.

- 2.11.3 On 24 October 2018 the authority wrote to the previous owner explaining its obligation to carry out an inspection on the barrier.

## **2.12 The 2019 failed pool inspection**

- 2.12.1 On 4 June 2019 the authority inspected the pool and reached the conclusion that the pool cover, as a barrier to restrict access to the pool, did not comply with section 162C of the Act.
- 2.12.2 The inspection checklist noted the pool is fitted with a pool cover but no other barrier is provided to restrict access, therefore there is no contained immediate pool area<sup>7</sup>. As a result, the authority listed a number of items it considered do not comply in relation to the containment of an immediate pool area.
- 2.12.3 In a “general comments” section of the inspection checklist, the authority noted:
- BC930965 (Dwelling Extensions) issued on 10/06/1994 [and code compliance certificate] on BC930965 issued on 23/06/2004 when the ‘Fencing of Swimming Pools Act 1987’ (FOSPA) was in force.
- Whilst the pool barrier does not comply with the inspection listed above (extracted from F9/AS1<sup>8</sup> / the ‘Building (Pools) Amendment Act 2016’), nor was the barrier compliant with FOSPA (requirements of the ‘Schedule’ of FOSPA not met nor the requirements of NZS8500:2006<sup>9</sup> met).
- 2.12.4 On 5 June 2019, the authority wrote to the previous owner attaching the inspection record and informing the previous owner that the pool barrier does not comply. The authority advised the previous owner compliance with section 162C of the Act can be established by:
1. Correcting the non-compliance aspects of the barrier : or
  2. Removing the pool
- 2.12.5 The parties corresponded about the compliance of the pool barrier between 19 November 2018 and 1 July 2019, and I have noted the key points of that correspondence below.
- 2.12.6 The previous owner:
- was convinced an exemption for the pool cover was granted when it was built and installed
  - requested the authority confirm whether an exemption was granted
  - asked the authority if a pool cover with slats would achieve compliance with section 162C
  - accepts that if the pool was installed today, the pool cover would not comply with the current Building Code, however section 162C(2)(b) requires the means of restricting access to the pool to be compliant with the Building Code that was in

<sup>7</sup> An “immediate pool area” is defined in section 7 of the Act as: the land in or on which the pool is situated and so much of the surrounding area as is used for activities carried out in relation to or involving the pool.

<sup>8</sup> Acceptable Solution F9/AS1 for New Zealand Building Code Clause F9 Means of Restricting Access to Residential Pools.

<sup>9</sup> New Zealand Standard 8500:2006 Safety Barriers and Fences Around Swimming Pools, Spas and Hot Tubs. Note: this standard was not cited in the previous compliance document F4/AS1 (1st edition, amendment 01), therefore was not a method of establishing compliance with the Building Code, but was often used in support of a proposed alternative solution.

force at the time it was constructed, and requested the authority review its position.

2.12.7 The authority noted:

- on the property file there is no application form for an exemption from FOSPA, no 'Swimming Pool Subcommittee Meeting' minutes, and no record of an exemption under FOSPA
- without an official 'Issued FOSPA Exemption' document on file, the authority is unable to inspect the pool in accordance with it
- a barrier in accordance with F9/AS1 is a way of complying with Clause F9. They are not the only way in which the performance criteria of Clause F9 can be met, but the authority must accept compliance with F9/AS1 as a means of complying with Clause F9
- a pool cover with slats is not a solution provided for in F9/AS1
- Determination 2018/005<sup>10</sup> had already considered whether the use of pool covers comply with Clause F9 of the Building Code and satisfy section 162C
- the authority intended to apply for a determination as it believes the code compliance certificate was issued in error because the barrier was never compliant with the FOSPA.

2.12.8 The Ministry received an application for determination on 13 August 2019.

2.13 Sometime between 15 December 2019 and 31 December 2019 the ownership of the property changed hands. The Ministry then provided the current owners with an opportunity to make a submission on the matter.

### **3. The submissions**

#### **3.1 The authority's submission**

3.1.1 In its application the authority provided copies of:

- email correspondence
- the application for building consent, plans and specifications, and the building consent
- the authority's requests for information and responses to these
- Determination 2012/037<sup>11</sup>
- photographs of the pool
- inspection records, including the failed pool inspection letter and checklist dated 5 June 2019
- the code compliance certificate dated 23 June 2004.

3.1.2 On 4 December 2019, at the request of the Ministry, the authority confirmed it held records of FOSPA section 6 exemption decisions made with respect to other pools

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<sup>10</sup> Determination 2018/005 Whether the use of automatic pool covers to swimming pools complies with Clause F9 of the Building Code and satisfies section 162C of the Building Act (21 March 2018)

<sup>11</sup> Determination 2012/037 Regarding a notice to fix issued in respect of a pool barrier (21 May 2012)

within its district. The authority provided three copies of “Swimming Pool Subcommittee exemptions” dated between 1993 and 1994.

### **3.2 The previous owner’s submission**

3.2.1 The previous owner's lawyer provided a submission dated 20 September 2019 including a background of the events. The lawyer submitted that there was no error in issuing the code compliance certificate and it should not be reversed because the pool was granted an exemption under section 6 of FOSPA and therefore was not required to comply with FOSPA, the Building Code of the time, nor with the current Act. (Paragraph 4.2 describes the relationship between FOSPA and the Act).

3.2.2 Supporting the summary, the previous owner’s lawyer included the following points (in summary):

- The previous owner had applied for an exemption under FOSPA section 6 in the response to the authority’s request for information (refer paragraph 2.4).
- The previous owner’s clear recollection of events is that an exemption from FOSPA was granted.
- As acknowledged in Determination 2018/015, powers in granting exemptions under FOSPA is not a matter that can be determined under the Act.
- The authority recorded that the pool cover was an “acceptable solution” and granted the building consent subject to the condition the pool cover was installed.
- In the previous owner’s lawyer’s opinion, the term “acceptable solution” is usually associated with waivers or modifications granted under the Building Act. Under subsection 34(4) and (6) of the Building Act 1991 (“the former Act”), a waiver or modification with regard to a pool fence shall be determined in accordance with FOSPA and not the Building Act.
- There is no reasonable explanation why the building consent was conditional on the installation of the pool cover except as a part of, or a consequence of, the grant of an exemption under FOSPA.

3.2.3 In regards to exemptions under section 6 of FOSPA the previous owner’s lawyer submitted:

- There are no formal requirements for territorial authorities to record FOSPA section 6 exemptions.
- The authority’s hand written note confirms the authority considered the previous owner's application for an exemption under FOSPA, was satisfied with the pool cover’s safety and decided to record as a condition of the building consent that the pool cover is installed.

3.2.4 In regard to the code compliance certificate and compliance with section 162C, the previous owner’s lawyer submitted:

- As an exemption was granted under section 6 of FOSPA in respect of the pool cover, in accordance with section 450B(2)(b) of the Act the pool is deemed to have barriers that comply with section 162C.
- If the authority’s decision to issue the code compliance certificate is reversed, the building consent will need to be amended to remove the condition that the pool cover be installed. To revoke the code compliance certificate and amend the

building consent after such a long period of reliance on them would be unreasonable.

### **3.3 Draft determination**

- 3.3.1 A draft of this determination was issued to the parties for comment on 27 November 2019.
- 3.3.2 The authority responded on 29 November 2019 accepting the draft determination without comment.
- 3.3.3 The previous owner did not respond to the findings in the draft, but notified the Ministry of the change in ownership.
- 3.3.4 The current owners did not provide a response to the draft determination after being invited to do so.

## **4. Discussion**

### **4.1 General**

- 4.1.1 The matter to be determined is whether the authority was correct to issue the code compliance certificate for the building work in respect of the pool cover used as the means to restrict access by unsupervised young children to the pool. The authority is now of the view that the pool barrier was never compliant with FOSPA or the Building Code and that it does not comply with section 162C of the Act. The authority considers the code compliance certificate was issued in error, and observed that reversing the issue of that certificate would mean the authority is able to issue a notice to fix requiring the owner of the property to bring the pool barrier into compliance.
- 4.1.2 Once a code compliance certificate has been issued for building work an authority is limited with regard to any action it can take in respect of that work<sup>12</sup> unless the decision to issue the code compliance certificate is reversed by Determination.
- 4.1.3 The building consent considered in this determination was issued under the former Act, and the code compliance certificate was issued on 23 June 2004. Accordingly the transitional provision section 436(3)(b)(i) of the current Act applied to the authority's decision to issue the code compliance certificate – meaning the authority was only able to issue the code compliance certificate if it was satisfied that the building work concerned complied with the Building Code that applied at the time the building consent was granted.
- 4.1.4 Therefore in order to determine whether the authority was correct to issue the code compliance certificate, I must consider whether the barrier complied with the Building Code that was in force when the building consent was issued, specifically the performance criteria for Clause F4 at the time.
- 4.1.5 The previous owner's lawyer is of the view that the pool cover was granted a special exemption under section 6 of FOSPA, and so was not required to comply with FOSPA or the Building Code in force at the time. For that reason I have also considered whether there is evidence of an exemption being granted, the effect of any exemption granted under section 6 of FOSPA, and conditions it was subject to if one was granted.

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<sup>12</sup> Other than when the building is dangerous, is earthquake-prone, or is insanitary under section 124(1), or the owner decides to alter the building, change its use, or change its intended life under section 114(2).

4.1.6 Section 188 of the Act requires me to consider whether the authority's decision should be confirmed, reversed or modified. In making that decision I have also considered the requirements under section 162C as they relate to the ongoing compliance of pool barriers.

4.1.7 In the following paragraphs I discuss:

- the relationship between FOSPA and the Act as it concerns exemptions under section 6 of FOSPA (paragraph 4.2)
- the evidence available about whether an exemption was granted under section 6 of FOSPA (paragraph 4.3)
- whether the pool cover complied with the Building Code in force at the time the authority issued the code compliance certificate (paragraph 4.4)
- the savings and transitional provisions (paragraph 4.5)
- whether the authority's decision to issue the code compliance certificate should be confirmed, reversed, or modified. (paragraph 4.6).

## 4.2 Section 6 of FOSPA and its relationship with the Building Act

4.2.1 Section 6 of FOSPA provided for discretionary exemptions to be granted by territorial authorities, where such an exemption would not significantly increase the danger to young children:

### 6 Special exemptions

- (1) A territorial authority may, by resolution, grant an exemption from some or all of the requirements of this Act in the case of any particular pool where the territorial authority is satisfied, having regard to the particular characteristics of the property and the pool, any other relevant circumstances, and any conditions it imposes under subsection (2), that such an exemption would not significantly increase danger to young children.
- (2) In granting an exemption under subsection (1), the territorial authority may impose such other conditions relating to the property or the pool as are reasonable in the circumstances.
- (3) Any exemption granted or condition imposed under this section may be amended or revoked by a territorial authority, by resolution.

4.2.2 Under the savings and transitional provisions of the current Act, where an existing residential pool constructed, erected or installed before 1 January 2017 has been granted an exemption under section 6 of FOSPA, in accordance with section 450B(2) the pool barrier, subject to the conditions of any such exemption, is deemed to meet the requirements of 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.

4.2.3 For completeness, I note that under section 34(4)(a) of the former Act, a building consent could be granted subject to a waiver or modification of the Building Code (subject to any conditions the relevant authority considered appropriate), and section 34(8) required the authority to notify the Building Industry Authority (one of the



predecessors to the Ministry) of the particulars concerning that waiver or modification.

4.2.4 However section 34(6) of the former Act sets out that:

Notwithstanding subsection (4) of this section, the question of whether there should be an exemption from the requirement for a fence to be provided in respect of any particular swimming pool shall be a matter to be determined in accordance with the Fencing of Swimming Pools Act 1987.

4.2.5 Accordingly, section 34(6) required any applications for a waiver of the relevant provisions of Clause F4 of the Building Code in relation to a pool barrier to be considered under section 6 of FOSPA. Where a section 6 exemption under FOSPA has been granted I consider that in effect the requirement to comply with Clause F4 is waived or modified.

4.2.6 The process and intention of section 6 exemptions was confirmed in guidelines<sup>13</sup> issued to territorial authorities. These guidelines were published to assist regulatory staff and building inspectors when interpreting and enforcing FOSPA.

4.2.7 When considering a special exemption under section 6 of FOSPA, an authority was required to consider the particular characteristics of the property and the pool on a case by case basis. A territorial authority had to be satisfied that grounds for an exemption existed for each particular case, and when granting the exemption state specifically what requirements of FOSPA would not apply.

### **4.3 Whether an exemption was granted under section 6 of FOSPA**

4.3.1 I am satisfied no exemption under section 6 of FOSPA was granted for this pool. The facts that lead me to this conclusion are outlined in the following paragraphs.

4.3.2 During the assessment of the building consent application, the authority was required to assess how compliance with FOSPA and Clause F4 were to be achieved. The drawings and specification supplied with the building consent application simply noted a pool cover and there was no other information provided other than that outlined in paragraph 2.2.

4.3.3 It is clear from the request for information (refer paragraph 2.3) that the authority required further information to establish compliance with Clause F4.3.4(f). At this point I do not consider the authority was considering an exemption under section 6 of FOSPA.

4.3.4 In a response to the request for information (refer paragraph 2.4), the designer noted their wish to apply for “dispensation” from FOSPA, and provided a copy of a document from the importer of the pool cover titled “reasons why automatic safety covers are a viable alternative to fencing” and appended to this a document titled “submission for dispensation” dated 1 August 1990.

4.3.5 As noted in paragraph 4.2.7, when an authority considers to whether grant an exemption under section 6 of FOSPA from some or all of the requirements of FOSPA in the case of a particular pool it must have regard to the particular characteristics of the property and the pool.

4.3.6 In the designer’s response to the request for information there were generic documents that pre-date the application for building consent. There was no information provided to the authority from the designer, including in the documents provided by the importer, requesting what part/s of FOSPA the pool barrier was to be

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<sup>13</sup> Fencing of Swimming Pools Act 1987 - guidelines for territorial authorities published in 1999 by the Department of Internal Affairs

exempt from. The previous owner's lawyer contends there isn't any reasonable alternative explanation why the Building Consent was conditional on the installation of the pool cover except as a part of, or consequence of, the grant of an exemption.

- 4.3.7 In my opinion, a likely reasonable explanation is that the officer of the authority assessed the documents provided by the importer which described how, in the importers opinion, pool covers achieve compliance with FOSPA and Clause F4 and the officer accepted that the pool cover would meet the performance criteria of Clause F4.3.4(f) i.e. restrict the entry of children under 6 years of age. The condition on the consent was likely included as a means of ensuring the pool cover was installed to the appropriate manufacturer's installation specifications.
- 4.3.8 With regard to the officer's hand written note referring to the use of the pool cover as an "acceptable solution" (refer paragraph 2.7); I note that pool covers were not provided for in the Schedule to FOSPA ("the schedule") and were not an acceptable solution for the purposes of establishing compliance with the Building Code, i.e. a solution that was in accordance with the approved document published by the Building Industry Authority<sup>14</sup>.
- 4.3.9 In my opinion the officer's reference to the pool cover being an "acceptable solution" indicates that the officer turned their mind to whether the pool cover was a solution that the officer considered would achieve compliance with the Building Code. I am of the view that this annotation does not support the contention that an exemption had been granted.
- 4.3.10 Furthermore, and in response to the comment from the previous owner's lawyer that there were no formal requirements for territorial authorities to record FOSPA section 6 exemptions, I note that section 12 of FOSPA provides:
- 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.
- 4.3.11 An exemption under section 6 of FOSPA could have only been granted by resolution of a delegated committee of elected council members. The delegated committee could not include any non-elected members, or any territorial authority officer (including any council inspector).
- 4.3.12 Further, section 22(1)(a) of the Local Government Official Information and Meetings Act 1987 required that where a local authority makes a decision or recommendation in respect of any person in that person's personal capacity, that person has the right to and shall, on request, be given a written statement of the findings.
- 4.3.13 Regardless of the authority's record keeping at the time, even if an exemption under section 6 of FOSPA had been discussed by a delegated committee of elected council members, I consider it unusual that the committee would not have kept minutes of its proceedings and decisions.
- 4.3.14 I am of the opinion that any record of any committee meeting that discussed such an important matter such as an exemption from some or all of the requirements of

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<sup>14</sup> Section 49(2) of the former Act provides "Any document, prepared or approved by the [Building Industry Authority] under subsection (1) of this section be accepted for the purposes of this Act as establishing compliance with those provisions of the building code to which it relates..." The equivalent in the current Act is section 19(1)(b) and (ba).

FOSPA would have been placed on the property file and provided to the previous owner.

- 4.3.15 As the authority has confirmed there is no application for an exemption from FOSPA form, no ‘Swimming Pool Subcommittee Meeting’ minutes and no record of an exemption under FOSPA on the property file, this leads me to the view that no such exemption was considered or granted.
- 4.3.16 Finally, a “Swimming Pool Subcommittee” was in existence and meeting at the time, and, as confirmed by the authority, a search has been made of the minutes over the relevant period. While there are records of decisions made with respect to other pools (refer paragraph 3.1.2), there is no record of an application or decision with respect to a pool at 78 Mountain View Road.

#### **4.4 Whether the pool cover complied with the Building Code in force at the time the authority issued the code compliance certificate**

- 4.4.1 Having reached the conclusion in paragraph 4.3 that there is insufficient evidence to confirm that an exemption was granted under section 6 of FOSPA, I must now consider whether the pool cover complied with the Building Code that was in force at the time the code compliance certificate was issued.
- 4.4.2 There is no dispute between the parties as to whether the pool cover complies with Clause F9 of the Building Code that is currently in force. The owner accepts that if the pool was installed today, the pool cover would not comply with the current Building Code (refer paragraph 2.12.6).
- 4.4.3 The relevant clause of the Building Code that was in force at the time the code compliance certificate was issued was Clause F4 Safety from falling. The relevant performance clauses were:
- F4.3.3 Swimming pools having a depth of water exceeding 400mm, 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.
- 4.4.4 The question of whether a pool cover without any other physical barrier to the pool or the immediate pool area will prevent drowning of and injury to young children by restricting unsupervised access by young children has been discussed in previous determinations<sup>15</sup>.
- 4.4.5 Those previous determinations considered either compliance with Clause F4 or Clause F9, whichever was applicable in the circumstances. Given both clauses require the restriction of access by children to the pool or immediate pool area (F4.3.4(f) and F9.3.1), I am of the view that the key points from those determinations are relevant in my assessment of the pool cover against the performance criteria in Clause F4.
- 4.4.6 The previous determinations concluded a pool cover without any other physical barrier to the pool or the immediate pool area does not adequately mitigate the risk of injury or death posed by the pool to young children through restricting access of unsupervised young children.

<sup>15</sup> Determination 2018/005 Whether the use of automatic pool covers to swimming pools complies with Clause F9 of the Building Code and satisfies section 162C of the Building Act (21 March 2018)  
 Determination 2018/052 Regarding whether an automatic pool cover complies with Building Code Clause F9 (26 October 2018)  
 Determination 2010/119 The use of a cover as a barrier to a swimming pool (3 December 2010)

4.4.7 For the benefit of the parties I reiterate the following key points reached in the previous determinations:

- A pool cover is a barrier and has the same effect as a pool fence, or door/window in an external wall, but only when the pool cover is closed.<sup>16</sup>
- When an automatic pool cover is opened so that people can use the pool, the requirements of the Building Code are no longer met.<sup>17</sup>
- A person must take active steps to close the pool cover and it must be closed whenever there is no supervising person in the pool area, even if the supervising person only leaves temporarily.<sup>18</sup>
- With a compliant pool fence and compliant self-closing gates or doors the supervising person can leave the pool area and does not have to do anything positive to ensure the barrier is in place because a compliant pool gate or door will close automatically behind them. Young children cannot then enter (or re-enter) the pool area because compliant gates cannot readily be opened by children under five years of age.<sup>19</sup>
- The requirement for gates that self-close recognises that people are not infallible and the effectiveness of the barrier should not be reliant on their behaviour.<sup>20</sup>
- Total reliance on the behaviour of the supervising person to ensure the safety of children under five years of age by never forgetting to close the pool cover is the weakness of the pool cover system that does not exist with a barrier with a gate that is opened only briefly to provide access into the immediate pool area and then closes automatically.<sup>21</sup>

4.4.8 One of the key features of using a pool cover to restrict access to the pool by young children is that its effectiveness relies on human behavior. The use of a solution that must be repeatedly reinstated through the actions of a person to maintain compliance is not consistent with the settings in the Building Code.

4.4.9 In respect of the need to reinstate the pool cover when the supervising person is no longer in the pool or immediately pool-side, I consider it would be inconsistent with the principles on which the Building Code has been drafted to rely on the actions or behaviour ‘management practices’ of the owner, occupier, or supervising person to attain the objectives of the Building Code.

4.4.10 In a recent district court decision<sup>22</sup> Judge Rowe considered human factors and the role of human agency in the Building Code:

[57] The scheme of the Building Act, Building Code and Clause C4.2 itself, are concerned with how a building is designed and constructed to achieve its functional requirements.

[58] It is therefore incorrect to measure the functional and performance requirements of a building against the likelihood of human error. The code is not concerned with whether persons using a building will act or respond in a particular way, but **whether the building facilitates the functional requirement [my emphasis]; ...**

<sup>16</sup> 2010/119 paragraph 5.2.4 and 2018/052 paragraph 5.2.2

<sup>17</sup> 2010/119 paragraph 5.2.4 and 2018/052 paragraph 5.2.2

<sup>18</sup> 2018/005 paragraph 5.2.5 and 2018/052 paragraph 5.2.4

<sup>19</sup> 2018/005 paragraph 5.2.6 and 2018/052 paragraph 5.2.5

<sup>20</sup> 2018/052 paragraph 5.2.4

<sup>21</sup> 2018/005 paragraph 5.2.5

<sup>22</sup> *Palmerston North City Council v Brian Green Properties (1971) Limited and Ministry of Business Innovation and Employment* [2020] NDC 1828

- 4.4.11 The Building Code is concerned with the design and construction of buildings and seeks to attain its objectives through the performance requirements for various aspects of buildings, such as building elements and materials, spaces and amenities, and building systems. Clause F4 (at the time the building consent was issued) is concerned with how pool barriers are designed and constructed to achieve the functional requirement of restricting access by unsupervised young children.
- 4.4.12 The regulations do not manage the actions of the building users – there is nothing in the Act or the Building Code that will ensure a supervising person removes young children from the pool area when they leave or that a person does not carry out an action (such as propping open a gate or disabling an alarm) that would render an otherwise compliant barrier non-compliant. Rather the regulations manage building work to ensure the building does not contribute unnecessarily to risks and to ensure that people who use buildings can do so safely<sup>23</sup>.
- 4.4.13 I also consider it important to note that in circumstances where there is no other physical barrier restricting access by young children to the pool, there is no defined “immediate pool area”. The risks inherent in this are:
- an adult using the pool may not be aware of a child present on another part of the property, and thus believe there is no risk in leaving the immediate vicinity of the pool (even temporarily) without first replacing the pool cover
  - leaving a pool cover open will mean that a young child present anywhere on the property may be able to access the pool without supervision and would be at risk of injury or drowning
  - there is no defined area from which a supervising person knowingly leaves or for which a supervising person is knowingly responsible for children present.

### **Conclusion**

- 4.4.14 I concur with the conclusions reached in the previous determinations and I consider the findings are relevant in this case; the use of the pool cover alone as a barrier to the pool does not comply with Clause F4 of the Building Code that was in force at the time the building consent was issued.

## **4.5 The savings and transitional provisions**

- 4.5.1 As discussed in paragraph 2.11, section 162C(1) of the Act requires residential pools to have physical barriers to restrict access to pools by unsupervised children under five years of age. This provision must be met regardless of when the pool was constructed.
- 4.5.2 Section 450B of the Act (refer paragraph 4.2.2) sets out the savings provision for existing residential pools that were constructed before 1 January 2017, which this pool was.
- 4.5.3 Section 450B(2) states an existing residential pool is deemed to have barriers that comply with section 162C if the barriers are compliant with the Schedule to FOSPA, or are compliant with the Schedule to FOSPA subject to any exemption granted under section 6 and the conditions of any such exemption.
- 4.5.4 As I have concluded in paragraph 4.3.1 that the pool cover was not subject to an exemption under section 6 of FOSPA, the savings provision for existing residential pools under section 450B are not applicable in this case.

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<sup>23</sup> Refer section 3(a) of the Act

- 4.5.5 Section 450A(1) states fencing of a residential pool in accordance with Clauses 1 to 10 of the Schedule to FOSPA is an Acceptable Solution for establishing compliance with the Building Code for the purpose of section 162C.
- 4.5.6 The Schedule sets out specific and prescriptive requirements for ‘fences’ as a means of restricting the access of children under 6 years of age to the pool or the immediate pool area. Pool covers are not provided for in the Schedule to FOSPA.
- 4.5.7 In conclusion, the pool cover does not comply with section 162C by way of these savings and transitional provisions, nor does it comply under section 162C(2)(b) because it does not comply with the Building Code that was in force at the time the code compliance certificate was issued.

#### **4.6 The code compliance certificate**

- 4.6.1 The final matter for consideration is whether the authority correctly issued the code compliance certificate.
- 4.6.2 As I have found that the pool cover alone as a barrier to the pool does not meet the relevant performance requirements of the Building Code in force at the time the building consent was issued, it follows that the authority was incorrect to issue the code compliance certificate.
- 4.6.3 A previous determination<sup>24</sup> confirmed the only way an authority can seek to withdraw a code compliance certificate is through a determination.
- 4.6.4 A determination reversing the authority’s decision to issue a code compliance certificate will enable the authority to issue a notice to fix requiring the pool barrier to be brought into compliance with the Building Code and to meet the requirements of section 162C. I note that it is not for the notice to fix to specify how the defects are to be fixed. That is a matter for the current owners to propose and for the authority to accept or reject.

##### **Amendment to the consent**

- 4.6.5 It is now up to the current owner to propose a design and apply for a new building consent to carry out the necessary work to bring the pool barrier into compliance with the Building Code.
- 4.6.6 The owner should also seek an amendment to the original building consent to refer to the pool barrier being constructed under the new consent, and to modify the start date of the durability period for Clause B2.3.1<sup>25</sup> to the date the code compliance certificate was originally issued in respect of any other building work that was carried out under the original building consent.
- 4.6.7 When the authority is satisfied that the pool barrier complies with the Building Code, the code compliance certificate can be reissued for the original consent and another for the building consent covering the work required to install a compliant pool barrier.
- 4.6.8 I note here that when the authority comes to reissuing the code compliance certificate for the work remaining under the original consent, unless there is evidence to suggest that it does not comply with the Building Code, a reassessment of that building work is unnecessary.

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<sup>24</sup> Determination 2009/006 Regarding the issuing of a code compliance certificate for a house constructed of precast concrete panels (13 February 2009)

<sup>25</sup> More information on durability modifications is available in an article titled ‘Modification of durability periods’ in Codewords Issue 39, August 2009. Codewords articles are published by the Ministry and are available on the Ministry’s website.

## **5. The decision**

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was incorrect in its decision to issue a code compliance certificate for building consent BC930965 and I reverse that decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 16 April 2020.

Katie Gordon  
**Manager Determinations**

## Appendix A: The legislation

A.1 The relevant sections of the Building Act 2004 referred to in this determination.

### **436 Transitional provision for code compliance certificates in respect of building work carried out under building consent granted under former Act**

- (1) This section applies to building work carried out under a building consent granted under section 34 of the former Act.
- (2) An application for a code compliance certificate in respect of building work to which this section applies must be considered and determined as if this Act had not been passed.
- (3) For the purposes of subsection (2), section 43 of the former Act—
  - (b) must be read as if—
    - (i) a code compliance certificate may be issued only if the territorial authority is satisfied that the building work concerned complies with the building code that applied at the time the building consent was granted; and

A.2 The relevant sections of the Building Act 1991 referred to in this determination.

### **34 Processing building consents---(1) The territorial authority shall grant or refuse an application for a building consent within the prescribed period.**

- 4) The territorial authority may grant a building consent subject to---
  - (a) Such waivers or modifications of the building code, or any document for use in establishing compliance with the building code, subject to such conditions as the territorial authority considers appropriate; and
  - (b) Such conditions as the territorial authority is authorised to impose under this Act or the regulations in force under this Act.
- (6) Notwithstanding subsection (4) of this section, the question of whether there should be an exemption from the requirement for a fence to be provided in respect of any particular swimming pool shall be a matter to be determined in accordance with the Fencing of Swimming Pools Act 1987.

A.3 Local Government Official Information and Meetings Act 1987

### **22 Right of access by person to reasons for decisions affecting that person**

- (1) Subject to sections 6, 7(2)(b), 8, and 44, where a local authority makes, on or after 1 March 1988, a decision or recommendation in respect of any person, being a decision or recommendation in respect of that person in that person's personal capacity, that person has the right to and shall, on request made within a reasonable time of the making of the decision or recommendation, be given a written statement of—
  - (a) the findings on material issues of fact; and
  - (b) subject to subsection (1A), a reference to the information on which the findings were based; and (c) the reasons for the decision or recommendation.

A.4 The relevant provisions of Clause F4 – current at the time the building consent was issued (revoked 1 January 2017)

#### **Clause F4 – Safety from falling**

##### **Objective**

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

##### **Functional requirement**

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



**Performance**

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

*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:

...

(f) In the case of a swimming pool, restrict the access of children under 6 years of age to the pool or immediate pool area.

*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*

A.5 The relevant provisions of Clause F9 – *inserted on 1 January 2017*

**Clause F9—Means of restricting access to residential pools****Objective**

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

**Functional requirement**

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

**Performance**

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

F9.3.2 Barriers must either—

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