



Determination 2012/037

Regarding a notice to fix issued in respect of a pool barrier at 16 Seaview Avenue, Te Puru

1. The matter to be determined

1.1 This is a Determination under Part 3 Subpart 1 of the Building Act 2004¹ (“the Act”) made under due authorisation by me, 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:

- J Johnson, S McGill and Claymore Trustees Limited, the owners of the property at 16 Seaview Avenue (“the applicants”)
- Thames Coromandel District Council, carrying out its duties and functions as a territorial authority and a building consent authority (“the authority”).

1.3 The determination arises from the authority’s decision to issue a notice to fix for a pool barrier built on the applicants’ property, and in respect of which a code compliance certificate had previously been issued.

1.4 The matter to be determined² is whether the authority correctly exercised its powers under section 164 of the Act in issuing the notice to fix.

1.5 In this determination:

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

1.6 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 Building Act or of the Building Code.

¹ 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 or by contacting the Department on 0800 242 243.

² Under section 177(1)(b) and 177(2)(f).

2. The background and building work

- 2.1 The applicants' property contains a house, built sometime after August 2001, a detached cottage and swimming pool.
- 2.2 In 2005, the applicants applied for a building consent to build the swimming pool. The pool was to be a lap pool, measuring 9m x 2m, and varying between 1.2m and 1.4m in depth.
- 2.3 On 11 July 2005 the authority issued a building consent (No. ABA/2005/906) for the pool. The consent was issued with 'special conditions' that referred to the need for the pool fence to comply with the requirements of the FOSP Act.
- 2.4 The approved plans show that two sides of the pool barrier were to be formed by an existing 1.8m high timber boundary fence. On the remaining two sides the barrier is formed by a 1.2m high 'pool fence' with 900mm x 1200mm 'pool security gates', and the north-west side of the house. The plans show doors and windows on this side of the house that open into the immediate pool area, but there are no notations on the plans about requirements for these.
- 2.5 The pool was subsequently built and the authority issued a code compliance certificate for it on 27 April 2006.
- 2.6 On 3 December 2010, the authority inspected the applicants' pool as part of its 'pool auditing programme' to check that it complied with the FOSP Act. The pool failed the inspection, and on 6 December 2010 the authority explained the reasons as follows:

The bifold doors on the house make up the pool barrier, they do not self-close and lock or have latches at 1.5 metres from floor level

The [kitchen] window is also a bifold and is below 1.2 metres from the ground and therefore must only open 100mm.

- 2.7 Correspondence subsequently passed between the authority and the applicants about:
- the need for the doors and windows to be self-closing and latching to comply with the FOSP Act and the Building Act 2004
 - whether the authority could now insist on compliance, having already issued a code compliance certificate for the pool and its barrier.
- 2.8 On 16 January 2012, the authority issued a notice to fix under sections 164 and 165 of the Building Act 2004. The notice stated that:

Particulars of contravention or non-compliance

Following inspection carried out on the 3rd of October 2010 and continuing correspondence, [the authority] has determined the bi-fold doors do not comply with the Fencing of Swimming Pools Act 1987. This is in respect of there being insufficient barriers from the house to the pool area.

To remedy the contravention or non-compliance you must:

Comply with the Fencing of Swimming Pools Act 1987.

3. Submissions

- 3.1 An application for determination was received by the Department on 9 February 2012. The applicants provided copies of:
- the building consent and code compliance certificate
 - the approved plans for the pool and barrier
 - correspondence between the parties and the notice to fix.
- 3.2 The authority made no submission in response to the application.
- 3.3 A draft determination was issued to the parties for comment on 17 April 2012.
- 3.4 The applicants responded in a letter received on 2 May 2012, accepting the draft determination and requesting that it be amended to require the authority 'remove the notice to fix on all publically (sic) accessible council records relating to [the] property'. In response, I note that this is not a matter that a determination can consider; however I suggest that the authority record this determination on the property file.
- 3.5 The authority responded in a letter dated 15 May 2012 accepting the draft. The authority noted that the plans in support of the building consent did not show the existence of bi-fold doors, and that the doors do not comply with the requirements of the FOSP Act as they do not self-close and are not fitted with appropriate latches. The authority also commented that it did not consider that in this case there was any reason why compliance could not be achieved and does not consider an exemption under Clause 11 of the Schedule should be considered.

4. Discussion

- 4.1 The applicants have applied for a determination about the authority's decision to issue a notice to fix for the bi-fold doors and window that form part of the pool barrier given that a code compliance certificate has already been issued for the building work.
- 4.2 An authority must issue a notice to fix under sections 164 of the Building Act 2004 where it considers on reasonable grounds that:
- (a) a specified person is contravening or failing to comply with [the Building Act] or [its] regulations (for example, the requirement to obtain a building consent)...
- Under section 164(2)(a), the notice to fix must require the person to remedy the contravention or comply with the Act or the regulations.
- 4.3 In Determination 2010/053, I considered the actions that a territorial authority was able to take once a code compliance certificate has been issued. That determination said:
- In my opinion, once a code compliance certificate has been issued for building work, an authority is unable to take any action in respect of that work unless:

- the building is dangerous, is earthquake-prone, or is insanitary³ or
- the owner decides to alter the building, change its use, or change its intended life⁴.

While the condition of the building may mean that it is not currently code-compliant, I do not accept that a building owner is required to bring a building into compliance with the Building Code. A building owner is only obliged to undertake building work in respect of an existing building for the reasons given [above].

4.4 In the present case, the authority has issued the notice to fix on the grounds that the pool barrier does not comply with the FO SP Act. This is not a correct use of the notice to fix provisions. Furthermore, as I outlined in paragraph 4.3, notices to fix cannot be issued in respect of building work that is covered by a code compliance certificate.

4.5 Conclusion

4.5.1 I conclude that the authority incorrectly exercised its powers under section 164 of the Act in issuing a notice to fix for the pool barrier when a code compliance certificate had already been issued for the building work.

4.5.2 If the authority considers that a code compliance certificate should not have been issued then a determination may be applied for requesting the authority's decision to issue the code compliance certificate be reversed. If the decision to issue the code compliance certificate is reversed, a notice to fix could then be issued in respect of any non-compliant work.

4.5.3 Although I do not have jurisdiction under the FO SP Act, I note that the authority also has enforcement powers under that act.

5. Guidance on how to achieve compliance

5.1 The FO SP Act requires pools to be protected by a fence that complies with the requirements of the Building Code⁵. Clause F4 of the Building Code requires that pools exceeding 400mm in depth have barriers, which are required to achieve the performance requirements of Clause F4.

5.2 Although I have not considered the compliance of the barriers with the Building Code, in order to assist the parties, I note that there are three ways of providing a solution in order to meet the requirements of the FO SP Act and the Building Code:

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

The Schedule has the status of a compliance document⁶ 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.

³ In terms of Section 124(1) of the Act

⁴ In terms of Section 114(2) of the Act

⁵ Under section 8(1) of the FO SP Act, other than those pools exempted under section 5 of the FO SP Act.

⁶ Under section 13B of the FO SP 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 8500⁷ 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.

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 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'.

- 5.3 To comply with Clause F4 of the Building Code as an acceptable solution (i.e. one that complies with a cited compliance document), the applicants' barrier would have to meet the requirements in the Schedule to the FOSP Act. Clauses 9 and 10 of the Schedule cover the operation of gates and doors that form part of a pool barrier. It appears that the applicants' doors do not comply with these clauses, because they are not fitted with appropriate latches and are not self-closing and self-latching.
- 5.4 Clause 11 of the Schedule of the FOSP Act creates an exemption from the application of these clauses for doors in buildings that create part of a pool fence. However, a territorial authority can only apply this where it 'is satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation'. An exemption should not be considered where compliant options are feasible.
- 5.5 The applicants could use an alternative solution to achieve compliance. Alternatively, the applicants could apply to the authority for an exemption under section 6 of the FOSP Act.
- 5.6 I note here also that, in this determination, I have not considered the compliance of the immediate pool area enclosed by the pool barrier. The authority may wish to look at this when assessing any proposed design solution.

⁷ NZS 8500:2006 Safety barriers and fences around swimming pools, spas and hot tubs.

6. Decision

- 6.1 In accordance with section 188 of the Act, I determine that the authority incorrectly exercised its powers in issuing a notice to fix for the applicants' pool barrier and I accordingly I reverse that decision.

Signed for and on behalf of the Chief Executive of the Department of Building and Housing
on 21 May 2012

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 Schedule 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.

A3. NZS 8500 requires:

the pool shall be enclosed by a isolation barrier where a wall of a house contains a child resistant window and/or child resistant doorset or doorsets, regardless of the direction of door swing.

Under NZS 8500, child-resistant doorsets are required to meet a number of requirements.

A5.1 The NZS 8500 requirements for child resistant doorsets are:

3.7 Child-resistant doorsets

3.7.1 Child-resistant doorsets shall comply with all of the following requirements.

- (a) Doors shall be fitted with a self-latching device that will automatically operate on the closing of the door and will prevent the door from being re-opened without manually releasing of the device;
- (b) Every door shall be fitted with a device that will automatically return the door to the closed and latched position when the door is stationary and 150mm from the closed and secured position;
- (c) The release for the latching device on the internal (house) side of the door shall be located not less than 1500mm above the floor;
- (d) There shall be no footholds wider than 10mm on the door or its frame between the floor and 1000mm above the floor;
- (e) The closing and latching of the door shall comply with 4.6
- (f) Horizontal members, vertical members, perforated materials or mesh, and finish shall comply with this Standard;
- (g) The doorset shall comply with the performance requirements for a gate for strength and rigidity of openings and strength of gate ...;
- (h) Doors from the house may swing in either direction; and
- (i) Pet doors to the immediate pool area are prohibited.

4.6 Closing and latching of doors

Every door shall be fitted with a device that will automatically return the door to the closed position and operate the latching device.

In addition to 3.7 each door shall:

- (a) Close and latch from a stationary point 150mm from the closed and secured position under the natural weight of the door; and
- (b) Have the latching device, door jamb and striker plate to which the door is attached capable of retaining a door in the closed position.

Appendices C, D, and E of NZS 8500 set out the methodology for testing for strength and rigidity of barrier/fencing openings, posts and footings and barrier fencing components