

Determination 2021/026

Regarding the compliance of a barrier to a small heated pool at 14 Shaw Street, Arrowtown

Summary

This determination considers whether the barrier to restrict access by unsupervised young children to a small heated pool complies with section 162C of the Building Act. This determination discusses the compliance obligations and considers whether a waiver or modification of the requirements relating to means of restricting access to the spa pool can be granted.



Figure 1: Spa pool and immediate surrounds

The legislation discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated:

- “sections” are sections of the Building Act 2004 (“the Act”);
- “sections of FOSPA” are sections of the Fencing of Swimming Pools Act 1987 (“FOSPA”)
- “clauses” are clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992
- “clauses of the Schedule” are the clauses in the Schedule to FOSPA (“the Schedule”).

The Act and the Building Code are available at www.legislation.govt.nz. Information about the legislation, as well as past determinations, compliance documents (e.g., acceptable solutions) and guidance issued by the Ministry, is available at www.building.govt.nz.

1. The matter to be determined

- 1.1. This is a determination made under due authorisation by me, Katie Gordon, National Manager Building Resolution, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry¹.
- 1.2. The parties to the determination are:
 - 1.2.1. the owners, Trustees of the J and I Ryan Family Trust (“the owners”) who applied for this determination
 - 1.2.2. Queenstown Lakes District Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination is the result of an inspection by the authority of the barrier to the owners’ small heated spa pool (“the spa pool”) to assess if the barrier is compliant with the Building Act². The authority is not satisfied that the spa pool barrier complies with section 162C of the Act and has refused to grant a waiver or modification under section 67A.
- 1.4. I note here that a decision by the authority to refuse to grant a waiver or modification under section 67A is not a matter for determination under section 177 of the Act. However, under section 188(3)(aa), a determination may incorporate a waiver or modification of section 162C(1) or 162C(2) along with any conditions that a territorial authority is able to grant or impose. A waiver or modification of section 162C(1) or 162C(2) may only be incorporated in this determination if I am satisfied

¹ The Building Act 2004, section 185(1)(a) provides the Chief Executive of the Ministry with the power to make determinations.

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

that it “would not significantly increase danger to children under five years of age” (section 188(3A)).

- 1.5. In this determination, I therefore consider:
 - 1.5.1. whether the spa pool barrier complies with section 162C of the Act³
 - 1.5.2. if the barrier does not comply, whether a waiver of modification should be incorporated into the determination under section 188(3)(aa).

2. The spa pool and background events

- 2.1. The spa pool is situated approximately five metres away from the house, in a corner of a courtyard to the north east of the property.
- 2.2. Based on documents provided by the parties, I understand a spa pool was originally installed in this location sometime during or after 1983. That spa pool was later replaced in the same location.
- 2.3. The north and east boundary walls next to the spa pool are approximately 1900mm and 2500mm high respectively. Sliding doors open from the house to the courtyard; these doors are not self-closing and do not have pool barrier alarms installed. The boundary walls and the walls of the house do not make up the barrier to the spa pool. The barrier consists of a lockable cover over the spa pool.
- 2.4. Sometime on or after 1998, the spa pool has been set down into the ground, with the top of the spa pool now approximately 600 mm above ground level. Between the spa pool and north fence, along the length of the pool, is a fixed wooden bench at the same height. There is another wooden bench seat shown in photographs close to the spa pool against the east boundary fence, but it appears this is not permanently fixed in place.
- 2.5. The spa cover is raised and lowered manually and is fitted with a ‘lifter’ that holds it in position when it is raised.
- 2.6. At the time of the authority’s inspection on 2 July 2019, the locking system for the spa pool cover was a series of latches, and the authority noted that one of the latches was broken. The authority concluded the spa pool cover did not comply as a barrier, and sent a letter on 3 July 2019, which described the following:

Top surface of spa 760mm or higher than adjacent floor or ground at all points, with no projections that could assist climbing.

760mm clear area from the top of pool wall (no climbable objects within 760mm radius of top of the pool wall).

Spa cover fitted with lockable fasteners (minimum 33mm wide). 1 x broken latch
Complying signage fitted to spa pool cover on opposite sides of cover “Warning: This spa pool cover must be kept locked except when under adult supervision”.

³ Under section 177(1)(a) of the Act.

No climbing points. The horizontal bars (used to manoeuvre the spa cover) fixed to the outside of the pool walls are climbable.

General comments: As the cover does not comply with [clause] F9.3.5, it cannot be considered to be a 'safety cover' and an alternative means of restricting access to the [small heated pool] is required.

- 2.7. The letter required the non-compliance be addressed within 30 days and advised the owners that if this was not achieved the owners may be issued with a notice to fix.
- 2.8. To resolve the situation the owners installed an electronic locking mechanism to the spa pool cover on one of the north corners. The mechanism is activated to unlock by using a remote inside the house that has been installed on a high cabinet. The mechanism automatically activates to return to the locked position when the spa pool cover is closed. The owners then sought a waiver or modification with respect to the use of a cover for the spa pool.
- 2.9. The authority subsequently notified the owners by email, dated 3 December 2019, that it had considered the information provided by the owners. The authority confirmed its decision not to grant a waiver or modification pursuant to section 67A of the Act.
- 2.10. The issue remained unresolved and the owners applied for a determination.

3. Submissions

The owners

- 3.1. In the application, the owners explained the reasons why the spa pool was set into the ground, which related to the physical needs of one of the owners and their ability to access the spa pool. The owners also submitted that erecting a fence around the spa pool would add an "unnecessary hurdle" with regard to accessibility for that owner.
- 3.2. The owners consider that the grant of a waiver would not significantly increase the danger to young children because:
 - 3.2.1. the locking mechanism works automatically when the cover is closed, so there is no chance of the supervising person forgetting to lock the cover;
 - 3.2.2. a young child would not work out how to get into the spa pool, and the remote is located higher than 'any fence latch';
 - 3.2.3. these two factors, together with the spa being within an 'enclosed locked property' makes it safer than other bodies of water in the community.

The authority

- 3.3. The authority's submission provided some background information and set out its views regarding compliance (in summary):
- 3.3.1. The authority had considered compliance by way of the Schedule to FOSPA⁴. The authority concluded the Schedule did not provide for the use of a cover as a barrier, and because the doors to the courtyard do not self-close and latch the spa pool did not have a barrier complaint with the Schedule.
 - 3.3.2. The authority also considered compliance with the current Building Code Clause F9. Because the top surface of the spa pool is less than 760 mm above the adjacent ground level, the barrier must be one that surrounds the pool rather than a cover, as provided for in Clause F9.3.2.
 - 3.3.3. In reaching a decision not to grant a waiver or modification, the authority had considered the information provided by the owners with regard to concerns about accessibility as well as the authority's own observations. The authority concluded that erecting compliant fencing on the two open sides of the spa pool with a self-closing and self-latching gate was feasible.

Further submissions

- 3.4. A draft of this determination was issued to the parties for comment on 30 March 2021.
- 3.5. The authority accepted the draft without comment.
- 3.6. The owners disagreed with the findings of the draft, and made the following points (in summary):
- 3.6.1. They disagreed with a description of the spa pool cover in the draft as being "not rigid" and "able to be lifted at the corner opposite the locking mechanism", noting that the authority's inspecting officer did not attempt to lift the cover with the locking mechanism in place.
 - 3.6.2. The owners also disagreed with statements in the authority's inspection records that a latch was broken and that the cover does not comply with Clause F9.3.5 (refer to paragraph 2.6). The owners stated the latches are not now used; the cover restricts entry of children when it is closed; the cover is able to withstand a reasonably foreseeable load; the cover can be readily returned to the closed position and has signage indicating the child safety features. The owners provided various photographs to support their statements.
 - 3.6.3. If the height of the spa pool was 760 mm, a child could still drag outside furniture to the spa pool and use it to gain access.
 - 3.6.4. In reference to a statement in the draft of the determination, that the regulations do not apply to public spaces where a child might encounter a river, lake or pond, the owners provided a copy of an advertisement of a

⁴ As provided for under sections 450A and 450B.

home with a large pond. The owners noted that similar homes are advertised where there is no restriction on children accessing the water features.

- 3.7. I have considered the parties' submissions in response to the draft and amended the determination as I consider appropriate.

4. The legislation

- 4.1. The ongoing compliance of pool barriers was regulated under FOSPA until 1 January 2017 when FOSPA was repealed and new provisions concerning residential pools were inserted into the Building Act (sections 162A to 162E, and savings and transitional provisions 450A and 450B).
- 4.2. The purpose of the residential pools provisions is to prevent drowning of or injury to young children⁵. The means by which this is achieved is the use of physical barriers that restrict access to residential pools by unsupervised children under five years of age (section 162C(1)).
- 4.3. Section 162C(2) provides:
- The means of restricting access referred to in subsection (1) must comply with the requirements of the building code –
- (a) that are in force; or
- (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance certificate or certificate of acceptance was issued (in relation to the means of restricting access to the pool).
- 4.4. The original spa pool was installed in approximately 1983. This work would have been carried out under a building permit. When FOSPA came into force in 1987 it applied to all pools regardless of when the pool was constructed. The spa pool was later replaced, and work was done around 1998 to lower the height of the spa pool. It is my understanding that this work was not subject of a building consent, code compliance certificate or certificate of acceptance. This means that section 162C(2)(b) is not available as a means to establish compliance with section 162C(1).
- 4.5. The savings and transitional provisions, sections 450A and 450B⁶, provide for the following as means of compliance with section 162C:
- 4.5.1. compliance with clauses 1 to 10 of the Schedule of FOSPA (section 450A(1))
- 4.5.2. compliance with the Schedule of FOSPA and any exemption granted under section 6 of FOSPA or clause 11 of the Schedule and the conditions of any such exemption (section 450B(2)(b))
- 4.5.3. compliance with the following criteria (section 450B(3)):

⁵ Section 162A of the Act.

⁶ Section 450B applies to residential pools constructed, erected, or installed before 1 January 2017.

- (a) the outside surface of the side walls of the pool is constructed so as to inhibit climbing; and
 - (b) no part of the top of any side wall of the pool is less than 1.2 m above—
 - (i) the adjacent ground level; and
 - (ii) any permanent projection from the ground outside of the pool and within 1.2m of the walls of the pool; and
 - (iii) any object standing on the ground outside of the pool and within 1.2 m of the walls of the pool; ...
- 4.6. With regard to the savings and transitional provisions:
- 4.6.1. I agree with the authority, that the Schedule of FOSPA did not provide for the use of pool covers, and accordingly section 450A is not available as a means of establishing compliance for the cover as a barrier. This conclusion is consistent with guidelines published to assist regulatory staff and building inspectors when interpreting and enforcing FOSPA⁷. The guidance stated that a specific exemption under section 6 of FOSPA must be granted to permit the use of a pool cover and a general policy could not be adopted to allow the automatic acceptance of pool covers as opposed to fencing.
 - 4.6.2. No exemption was granted by the authority for the spa pool cover, and accordingly section 450B(2) is not available as a means of establishing compliance for this spa pool cover.
 - 4.6.3. The spa pool does not meet the criteria in section 450B(3) because it is less than 1.2 m above ground level.
- 4.7. Accordingly, the barrier to restrict access to the spa pool must comply with the Building Code that is currently in force. The relevant clause of the Building Code is Clause F9 *Means of restricting access to residential pools*.
- 4.8. Section 162C(3) provides:
- In the case of a small heated pool, the means of restricting access referred to in subsection (1) need only restrict access to the pool when the pool is not in use.
- This provision enables the use of covers as a barrier for small heated pools. A cover is removed to allow the small heated pool to be used, but after use the cover must be returned to its closed and latched position.

5. Compliance of the spa pool cover with Clause F9

- 5.1. The relevant performance criteria in Clause F9 are as follows:

F9.3.1

⁷ *Fencing of Swimming Pools Act 1987 - guidelines for territorial authorities* published in 1999 by the Department of Internal Affairs.

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

Limits on application

In the case of a small heated pool, the means of restricting access referred to in Performance F9.3.1 need only restrict access to the pool when the pool is not in use.

F9.3.2 Barriers must either–

- (a) surround the pool (and may enclose the whole or part of the immediate pool area); or
- (b) in the case of a small heated pool, cover the pool itself.

Limits on application

Performance F9.3.2(b) applies only to those small heated pools where the top surface of every wall of the pool is at all points not less than 760 mm above the adjacent floor or ground and the walls of the pool inhibit climbing. [my emphasis]

...

- 5.2. Clause F9.3.2(b) is subject to limits on application – it applies only to those small heated pools where the top surface of every wall of the pool is at all points not less than 760mm above the adjacent floor or ground and the walls of the pool inhibit climbing. In this case the spa pool is less than 760 mm above the ground, and accordingly a cover cannot be used to achieve compliance with Clause F9.3.2. I note also that the cover lifter offers hand and footholds for climbing when the cover is open.
- 5.3. The spa pool cover does not comply with Clause F9 and therefore does not comply with section 162C.

6. Waiver or modification

- 6.1. I now consider whether a waiver or modification of section 162C(1) or (2) should be incorporated in this determination.
- 6.2. A waiver or modification of sections 162C(1) or 162C(2) may only be incorporated in this determination if I am satisfied that the waiver or modification ‘would not significantly increase danger to children under five years of age’⁸.
- 6.3. The power to grant a waiver or modification recognises that the Building Code cannot cover all possible situations, and provides the flexibility to address unusual sets of circumstances on a case-by-case basis.
- 6.4. The owners sought a waiver on grounds that one of the owners required the height of the pool lower for accessibility, and a fence around the pool would add an ‘unnecessary hurdle’ for that owner to overcome. In the owners’ opinion, the lowered height would not significantly increase danger to young children (for reasons described in paragraph 3.2).
- 6.5. For completeness, I note that I have not taken into consideration the authority’s record of a broken latch. The spa pool is equipped with a locking mechanism and the owners have stated that the latches are no longer used to secure the cover. Nor have I assessed the durability or operation of the locking mechanism.
- 6.6. The locking mechanism operates in one corner of the cover. From video evidence provided by the owners, it is apparent the cover is able to be lifted at the corner opposite the locking mechanism when the mechanism is in the locked position⁹. However, based on the information I have received there does not appear to be any dispute regarding the use of the locking mechanism to prevent the cover being opened once it has been closed. Because there is no dispute on this matter I have considered the waiver or modification only in respect of the use of a cover for a spa pool where the top surface of the wall is less than 760 mm high and there are features that enable a child to climb the walls.
- 6.7. Previous determinations¹⁰ have established that a waiver or modification may be granted when “compelling reasons ... exist that support the view that a waiver is appropriate”¹¹, and it is reasonable to do so in the circumstances. Determination

⁸ pursuant to section 188(3A) of the Act.

⁹ Video footage provided by the owners indicates this corner of the cover may be able to be opened more than 100 mm. However, I have not been provided with a measurement for the height this corner is able to be lifted or the force (newton or kilogram-force) that would be required to lift it and therefore whether it would be readily opened by children.

¹⁰ See, for example, *Determination 2006/085: Refusal of a code compliance certificate for a building with a plywood cladding system* (7 July 2006).

¹¹ *Determination 2012/049: Regarding the refusal to issue a code compliance certificate for a 16 year-old house with monolithic cladding* (12 July 2012).

2015/010¹² described a list of factors, which are in no way exhaustive, that should be taken into account when considering whether a waiver or modification is reasonable:

- 6.7.1. The extent and possible consequences of the non-compliance with the specific performance clause.
 - 6.7.2. The availability of other reasonably practicable solutions that would result in full compliance.
 - 6.7.3. Any special and unique circumstances of the building work which may be subject to the waiver or modification.
 - 6.7.4. The extent to which the modification or waiver will still be consistent with the purposes and principles of the Act.
 - 6.7.5. The waiver or modification complying with the relevant functional requirement of the specific clause and meeting the objective of the Building Code.
- 6.8. I have considered the above factors in relation to the owners' spa pool and make the following comments:
- 6.8.1. Safety of building users is a key principle of the Act, which is reinforced in Clause F9's objective "to prevent injury or death to young children involving residential pools" and its functional requirement to prevent their unsupervised access, and in the provisions of the Act that concern the ongoing compliance of pool barriers.
 - 6.8.2. Swimming pools and spa pools present a risk to unsupervised young children, and so the Act requires physical barriers that will restrict access by unsupervised young children to the pool.
 - 6.8.3. The Building Code provides for the use of covers on small heated pools subject to the pool itself meeting criteria that lessen the risk of very young children being able to access the pool. The consequences of the spa pool being a lower height and having features that enable climbing means that it would be easier for a young child to access the spa pool should the cover not be closed after use.
 - 6.8.4. I acknowledge that there is an apparent conflict between accessibility for one of the owners and the requirement to restrict access by young children. I have received insufficient information on investigation of other feasible design solutions that would adequately restrict access to the spa pool by unsupervised young children while preserving accessibility.
 - 6.8.5. I am of the view that a waiver or modification with regard to the use of a pool cover for a small heated pool that is 600 mm high above ground and

¹² *Determination 2015/010: Regarding the authority's refusal to grant a modification of Clause C3.4(a) of the Building Code in respect of materials used for internal surface linings at a new school hall (31 March 2015).*

that has features that enable climbing would not be consistent with the purposes and principles of the Act.

- 6.9. Taking into account the factors discussed above, I do not consider that there are compelling reasons for a waiver or modification to be granted with respect to the owners' spa pool, and I am not satisfied that a waiver or modification of section 162C(1) or (2) would not significantly increase the danger to children under five years of age.

7. Other matters

- 7.1. The owners have referred to risks present to young children of other bodies of water in the community and water features on other residential properties. The owners also argue that even if the height of the spa pool was raised to 760 mm, in order to meet the criteria for using a cover as the means of restricting access, a child would be able to access the spa pool by dragging over and climbing on outdoor furniture.
- 7.2. I offer the following comment to assist in understanding the regulations and how they apply.
- 7.3. A key purpose of the Act is the regulation of buildings to ensure that people who use them can do so safely and without endangering their health. The Act does not apply to water features in public spaces that a child might encounter, such as rivers, lakes or ponds for example. Nor is it a means by which the behaviour of people is regulated; rather it is concerned with the design and construction of buildings (including residential pools and associated barriers) to achieve performance standards.
- 7.4. The provisions in the Building Act apply to "residential pools", which are defined in section 7 of the Act¹³. Whether or not various types of water features on other residential properties fall within the definition of a residential pool is not a matter for consideration in this determination. This determination can only consider the compliance of the owners' spa pool.

¹³ *Residential pool* means a pool that is— (a) in a place of abode; or (b) in or on land that also contains an abode; or (c) in or on land that is adjacent to other land that contains an abode if the pool is used in conjunction with that other land or abode.

8. The decision

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

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 November 2021.

Katie Gordon

National Manager, Building Resolution

APPENDIX A

A1 Sections of the Building Act 2004 referred to in this determination

67A Territorial authority may grant waivers or modifications in relation to means of restricting access to residential pools

- (1) A territorial authority may grant a waiver or modification of section 162C(1) or (2) (which requires residential pools to have means of restricting access by unsupervised children) if the territorial authority is satisfied that the waiver or modification would not significantly increase danger to children under 5 years of age.
- (2) In deciding whether to grant a waiver or modification under subsection (1), the territorial authority must have regard to all of the relevant circumstances (including the particular characteristics of the pool and the land on which it is situated).

162C Residential pools must have means of restricting access

- (1) Every residential pool that is filled or partly filled with water must have physical barriers that restrict access to the pool by unsupervised children under 5 years of age.
- (2) The means of restricting access referred to in subsection (1) must comply with the requirements of the building code—
 - (a) that are in force; or
 - (b) that were in force when the pool was constructed, erected, or installed (after 1 September 1987) and in respect of which a building consent, code compliance certificate, or certificate of acceptance was issued (in relation to the means of restricting access to the pool).
- (3) In the case of a small heated pool, the means of restricting access referred to in subsection (1) need only restrict access to the pool when the pool is not in use.
- (4) The following persons must ensure compliance with this section:
 - (a) the owner of the pool:
 - (b) the pool operator:
 - (c) the owner of the land on which the pool is situated:
 - (d) the occupier of the property in or on which the pool is situated:
 - (e) if the pool is subject to a hire purchase agreement (as that term is defined in the Income Tax Act 2007), the purchaser of the pool:
 - (f) if the pool is on premises that are not subject to a tenancy under the Residential Tenancies Act 1986 but the pool is subject to a lease or is part of premises subject to a lease, the lessee of the pool or the premises.

162D Periodic inspections of residential pools

- (1) Every territorial authority must ensure that the following residential pools within its jurisdiction are inspected at least once every 3 years, within 6 months before or after the pool's anniversary date, to determine whether the pool has barriers that comply with the requirements of section 162C:
- (a) residential pools other than small heated pools:
 - (b) small heated pools that have barriers that are not exempt, in terms of Schedule 1, from the requirement to have a building consent.

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- (3) A determination may incorporate—
- (a) waivers or modifications of the building code; and
 - (aa) waivers or modifications of section 162C(1) or (2); and
 - (b) conditions that a territorial authority or regional authority, as the case may be, is able to grant or impose.
- (3A) The chief executive must only grant a waiver or modification of section 162C(1) or (2) if the chief executive is satisfied that the waiver or modification would not significantly increase danger to children under 5 years of age.

...

450A Transitional and savings provision for residential pools

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

fencing means any barrier or barriers used to enclose a pool (or an immediate pool area) so as to restrict or prevent access to the pool.

450B Savings provision for existing residential pools

- (1) This section applies to a residential pool that was constructed, erected, or installed before 1 January 2017 (an existing pool).
- (2) An existing pool is deemed to have barriers that comply with section 162C if the barriers—
 - (a) complied with the Schedule of the Fencing of Swimming Pools Act 1987 (as that schedule was in force) immediately before 1 January 2017; and
 - (b) continue to comply with those requirements subject to—
 - (i) any exemption that was granted under section 6 or clause 11 of the Schedule of that Act and that was subsisting immediately before 1 January 2017; and
 - (ii) the conditions of any such exemption.

...