

Determination 2022/024

The issue of two notices to fix for a pool barrier subject to a code compliance certificate

1373 Eighty Eight Valley Road, Wakefield

Summary

This determination considers the authority's decision to issue two notices to fix for a non-compliant pool barrier. The determination turns on whether the authority can issue a notice to fix to the current owners for a contravention of section 162C when they did not undertake the building work and when there is a code compliance certificate for that building work. The determination also considers the form and content of the notices that were issued.



The legislation discussed in this determination is contained in Appendix A. In this determination, unless otherwise stated, references to “sections” are to sections of the Building Act 2004 (“the Act”) and references to “clauses” are to clauses in Schedule 1 (“the Building Code”) of the Building Regulations 1992.

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 of the property in which the pool is located, K Marshall and L Buchanan (“the owners”) who applied for the determination; and
 - 1.2.2. Tasman District Council (“the authority”), carrying out its duties as a territorial authority.
- 1.3. This determination arises from the decision of the authority to issue two notices to fix (“the notices”) in relation to a pool barrier that does not comply with the requirements of the Act. The authority issued the notices after a previous determination (“the first determination”) concluded the pool barrier does not comply with the Building Code as required by section 162C of the Act².
- 1.4. The owners believe the authority was incorrect to issue the notices because:
 - 1.4.1. the pool barrier was constructed under a building consent and is subject to an existing code compliance certificate
 - 1.4.2. the authority carried out inspections under the Fencing of Swimming Pools Act (“FOSPA”) and passed the pool barrier as compliant

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

² Determination 2021/015: Regarding the compliance of an existing pool barrier. Issued 19 July 2021.

- 1.4.3. the owners did not carry out any building work and cannot be held responsible for or required to remedy non-compliant building work carried out by the previous owner.
- 1.5. The owners have also raised concerns about the deadline included in the notices, the remedy provided in the notices, and whether the notices were in accordance with Form 13 of the *Building (Forms) Regulations* – in particular, with regard to the lack of reference to a specific building consent and wording about fines. Altogether I refer to these issues as the “form and content” of the notices.
- 1.6. The matter to be determined, under section 177(1)(b) and (3)(e), is whether the authority was correct to issue notices to fix NF0401 and NF0402 for the contravention of section 162C. In deciding this matter, I must consider whether a notice to fix for contravening section 162C can be issued to an owner who was not responsible for carrying out the building work and when the building work is the subject of a code compliance certificate. I will also consider whether the notices are valid with regard to the form and content.

2. The pool barrier and background

- 2.1. Determination 2021/015 describes the pool and barrier in detail. In summary, the pool is in a courtyard between a dwelling, a studio and a garage (see title page photo and figure 1 of 2021/015). The barrier consists of the walls of the main dwelling, studio, and garage, the boundary fences and gates, and small sections of fencing between the buildings and boundary fences.
- 2.2. Construction of the pool and buildings was carried out before the current owners purchased the property. The authority had issued a building consent under the Building Act 1991 for that work, and a code compliance certificate was issued on 19 October 2006. The owners purchased the property in 2008.
- 2.3. According to the owners, no building work or alterations have been made to the pool barrier after the code compliance certificate was issued.
- 2.4. The authority carried out inspections of the pool barrier under FOSPA in 2009 and 2012, which both passed as compliant.
- 2.5. On 1 January 2017, FOSPA was repealed and replaced with new provisions in the Act (sections 162A to 162E)³. On 13 November 2019, the authority carried out an

³ Performance clauses of the Building Code relating to pools in Clause F4 were also repealed and Clause F9 – ‘Means of restricting access to residential pools’ was inserted.

inspection in accordance with section 162D and advised the owners that the pool barrier did not comply with section 162C.

- 2.6. The owners sought a determination on the compliance of the pool barrier. They noted that because no changes had been made to the pool barrier, it was either compliant or it never had been compliant despite being constructed under a building consent and having a code compliance certificate. The matter the owners sought to have determined did not include the authority's decisions to issue the building consent and the code compliance certificate, and therefore those decisions were not considered.
- 2.7. Determination 2021/015 was issued on 19 July 2021. It concluded the barrier does not comply and the area enclosed by the pool barrier does not constitute the 'immediate pool area'⁴. Neither the owners nor the authority appealed the determination, and no application for determination has been lodged for me to consider the decisions made by the authority to issue the building consent or the code compliance certificate.
- 2.8. On 10 August 2021, the owners were asked to advise the authority (by 16 August) of their proposal to make the barrier compliant and when this would happen. The following day the owners advised the authority that they were exploring available options but were unsure when they would be in a position to finalise the proposal.

The notices to fix

- 2.9. On 22 September 2021, the authority issued two notices to fix. The covering letter referred to earlier correspondence seeking confirmation of a timeline for remedying the non-compliance and acknowledged that recent events relating to Covid-19 restrictions may have presented challenges.
- 2.10. In notice to fix NF0401, the particulars of contravention or non-compliance and the remedy were described as follows:

Particulars of contravention or non-compliance

Pursuant to s 164 of the Building Act 2004 (the Act) Tasman District Council considers on reasonable grounds that the specified persons named in this notice are contravening or failing to comply with the Act or the Regulations under the Act.

In particular, contrary to s 162C of the Act, the residential pool at the property, which is filled or partly filled with water, does not have

⁴ 'Immediate pool area' means 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.

physical barriers that restrict access to the pool and the immediate pool area by unsupervised children under 5 years of age and which comply with the requirements of the NZ Building Code and/or the Fencing of Swimming Pools Act 1987, as set out in Determination 2021/015 ...

Photographs attached to this notice demonstrate: the present pool barrier does not enclose the immediate pool area; doors into the immediate pool area do not adequately restrict access; East gate is not fitted with a self-closing and latching device.

To remedy the contravention or non-compliance you must:

By 12 October 2021, erect a temporary fence around the pool area of a suitable height, material and rigidity to restrict the passage of children under 5 years of age and provide safety from falling.

While not a requirement, you may also consider draining the pool of water and keeping it empty (until the requirements of section 162C are complied with). However, a temporary barrier as above may be more appropriate in the circumstances as long as it addresses both the risk of drowning and falling into an empty pool.

...

- 2.11. The notice encouraged the owners to contact the authority to discuss the options available before carrying out any work and noted that the owners were to advise the authority once the work was completed.
- 2.12. Notice to fix NF0402 included the same particulars of contravention or non-compliance, but with a different remedy:

By 1st December 2021, install a suitable barrier to restrict access to the pool by children under 5 years of age in compliance with s 162C of the Act and clause F9 of the NZ Building Code.
- 2.13. The notice directed the owners to advise the authority once the work was completed and noted a building consent was likely to be required.
- 2.14. On 28 September 2021, the owners wrote to the authority to confirm that they were taking steps to address the issue and would make the pool barrier compliant “as quickly as possible”. They noted that they had received a draft technical assessment of remedial options and valuation impact, and would provide a timeline and plan by 18 October 2021. The owners requested the authority rescind the notices.

- 2.15. On 1 October 2021, the authority advised the owners that it was “rescinding” notice to fix NF0401 but that NF0402 “will continue to be in place for the moment”. The authority has submitted NF0401 was rescinded on the basis that the owners were committed to providing a plan and timeline by 18 October 2021 for a permanent solution to resolve the matter.

3. Submissions

- 3.1. In making this determination I have considered all of the submissions received from the parties. The submissions are summarised below, including those made in response to a draft of this determination that was issued to the parties on 10 February 2022.

The owners

- 3.2. The owners dispute the authority’s decision to issue the notices and sought this determination.

- 3.3. Regarding the application of the legislation, the owners submit (in summary):

3.3.1. The notices should not have been issued to them because the owners were not responsible for carrying out the building work and the pool barrier has a valid code compliance certificate. The authority would have to first seek a determination to revoke the code compliance certificate before it could issue a notice to fix for non-compliance with section 162C.

3.3.2. The issuing of the notices has the effect of making the owners liable for remedying a non-compliance that they had no hand in creating; they neither actively contravened section 162C by causing the barrier to not comply, nor passively failed to comply with section 162C by letting the barrier fall into disrepair. Therefore, for the purpose of section 164(1)(a) the owners cannot be said to be “contravening or failing to comply”, rather they are simply in possession of building work undertaken by others who contravened section 17⁵.

3.3.3. The owners cited Determination 2012/037⁶ and *Waikato Regional Council v Poseidon Holdings*⁷ (“Poseidon”). The owners acknowledge their

⁵ Section 17 of the Act requires that all building work must comply with the building code to the extent required by the Act, whether or not a building consent is required in respect of that building work. I note that an equivalent provision existed in section 7 of the Building Act 1991, under which the building consent was issued.

⁶ Regarding a notice to fix issued in respect of a pool barrier. Issued 21 May 2012.

⁷⁷ NZDC 6951 [2021].

circumstances differ from those in *Poseidon*, but they consider there is a legal principle that applies equally to their situation – that enforcement action should not be taken against an innocent party, and “contravening or failing to comply” requires some action, failure or omission on their part. The authority would need to establish the owners had actively contributed to the non-compliance of the pool barrier.

3.3.4. The owners consider the distinction drawn in the draft of this determination between *Poseidon* and their case was artificial and incorrect. They maintain the principle in *Poseidon* must apply to the particular circumstances in this case, though not necessarily to every situation where a subsequent owner is alleged to have contravened section 162C. The owners consider that they were never afforded an opportunity to comply with section 162C because the non-compliant barrier had been certified by the authority as being compliant and the owners had relied on the code compliance certificate.

3.3.5. The premise of the notice to fix as an enforcement tool is predicated on authorities not approving or certifying work that is not compliant. The owners should not now be penalised through the issuance of the notices for having a non-compliant pool barrier because it is an issue created by a failure of the authority when it issued the building consent. Parliament would not have intended for an owner to be prosecuted for the failure of others.

3.3.6. Section 162C(2) contemplates two situations:

- where a pool has not been constructed in compliance with “a previous building act”, no code compliance certificate will have been issued, and the pool will need to comply with section 162C(2)(a) ie the Building Code currently in force;
- where a pool has been constructed in compliance with “a previous building code” but no code compliance certificate has been issued, a later code compliance certificate or certificate of acceptance “is acceptable”.

3.3.7. On its plain and ordinary meaning and purposively read, section 162C(2)(b) only contemplates two situations: a specified person has allowed the pool barrier to degrade to the point where it no longer complies or they have intentionally removed the barrier and refuse to replace it.

3.3.8. The insertion in section 162C(2)(b) of a requirement that a pool must be signed off (by way of a code compliance certificate or a certificate of acceptance) for it to comply with section 162C(1) indicates that the provision

has been drafted on the premise that authorities will not issue those certificates for non-compliant building works. Rather, section 162C(2)(a) applies for pool barriers that are not compliant. The provision does not contemplate non-compliant work would have been approved, “and therefore [the owners’] situation is not captured “by the applicability of section 162C”.

3.3.9. The result of a determination that the notices were correctly issued is the authority can pass all of the impacts of its incorrect decision making (in granting the building consent and code compliance certificate) to an innocent third party to its own benefit. Notices to fix are an enforcement tool but were never intended to pass liability and responsibility on to innocent people in this way.

3.3.10. “Perverse incentives are created” if notices to fix can be issued because the cost and impact of an authority’s failure then fall on the innocent party and the authority is not held accountable. The owners consider this would weaken the regulatory system. In contrast, there is no detriment to the system if the notice to fix cannot be issued to the owners in this circumstance, as it would create a positive incentive for the authority to carry out their duty (approving the building work) correctly. The intention of FOSPA was that over time building consent authorities “would completely remove swimming pool fencing risks through their consenting activities”, and that remains the case because non-compliant pools cannot be consented.

3.3.11. The owners consider that the authority has an inherent and pecuniary conflict in making its decision to issue the notices because it is responsible for approving and certifying non-compliant building work. The issue of the notices “directly benefits [the authority and is] self-serving in respect to the court action against [the authority]” (refer paragraph 5.36 of this determination). In order to issue notices to fix, the authority must have ‘reasonable grounds’ to do so; the conflict of interest means that it “cannot easily meet that test”.

3.4. The owners also submit the authority did not meet the “reasonable grounds” test to issue the notices because the owners did not contravene or fail to comply with the Act and the authority did not have all the information it needed to issue the notices. The owners submit the authority “conducted a sub-standard pool inspection” in November 2019 which did not address the issue of the area

enclosed as the 'immediate pool area', but rather focussed on the doors (which become irrelevant in respect to achieving compliance).

Consequently, what that means is that a pool compliance person from [the authority] has never actually viewed the on-site existing situation in regard to the immediate pool area issues with any view as to achieving what might constitute actual compliance.

3.5. In responding to the draft of the determination, the owners submitted the correct regulatory notice in this case was a dangerous building notice issued under section 124⁸ requiring the owners to make the pool and surrounds safe, rather than a notice to fix.

3.5.1. The danger posed by the pool "might have been sufficient for a Dangerous Building Notice to be issued instead, in recognition of the fact that it would be improper to issue a [notice to fix] and visit us with criminal liability for an apparent breach of s162C that the authority caused".

3.5.2. A dangerous building notice does not necessarily impose criminal liability on property owners for failing to remedy the situation in the way a notice to fix does, provided the owners did not fail to comply with any of the provisions of a notice issued under section 124(2)(c).

3.5.3. A dangerous building notice could have resulted in conditions of entry and limits on who was on the property and in what numbers, which would have put an emphasis on safety and not liability, and be more in keeping with the circumstances that gave rise to this situation.

3.5.4. A dangerous building notice would have made more sense in terms of cost and a temporary, reasonable, and effective resolution to the safety aspect. It would have been significantly cheaper to comply with "and fairer in the circumstances".

3.6. The owners also contend that in rescinding one notice to fix the authority had "automatically invalidated the other" on the basis that both notices were issued for the same reasons and regulatory assessment.

3.7. Regarding the timeframe, remedies, adherence to Form 13 and reference to a building consent, the owners submit (in summary):

⁸ Section 124: Dangerous, affected, or insanitary buildings: powers of territorial authority.

Timeframe

- 3.7.1. The owners engaged technical experts to assess remedy options and impacts in January and February 2020, and again in February 2021 before the first determination was issued.
- 3.7.2. Timeframes specified in the notices are unreasonable because of technical issues involved in constructing a compliant barrier, and although aware of the technical issues the authority ignored those in setting the timeframes. The owners provided information in their submission about what they consider to be relevant technical issues with installing a barrier, and submitted that the time taken for the necessary building work to be completed supports their contention that the timeframes in the notices were unreasonable.
- 3.7.3. The authority did not carry out an assessment of the difficulties of a remedial solution to establish a practical timeframe for the necessary works.
- 3.7.4. Beyond the time to investigate and decide on an option, there are Covid-19 related supply issues, selection and availability of people to do the work, coordination and sequencing of work, the need to make an application for building consent, as well as technical challenges onsite to consider in setting a reasonable timeframe. In general it is also unreasonable to expect owners to have finances readily to hand for a temporary fence and then a permanent remedy in place within 10 weeks.
- 3.7.5. The authority's stated safety concerns in setting the timeframe are inconsistent with its performance in approving non-compliant pool barriers in its district over an extended period of time.
- 3.7.6. The pool barrier was accepted as compliant for 15 years. There was an 18 month delay to confirm (via the first determination) that the barrier is not compliant, yet the notice allowed less than 10 weeks to resolve the non-compliance.

NF0402

- 3.7.7. The fact that it took until mid-December to get the building consent application prepared gives a more realistic indication of the timeframe required.
- 3.7.8. Though work was underway, because of the complexities in implementing a remedy the timeframe was not realistic.

Remedies

- 3.7.9. The remedies were limited to putting in a suitable barrier and did not provide for other options, such as decommissioning the pool.
- 3.7.10. Each possible remedy has a complex mix of advantages, disadvantages, economic and aesthetic impacts, loss of capital value and practical/technical issues. Limiting consideration of options to just a barrier is not reasonable.

NF0401

- 3.7.11. Because of the location of the pool between the dwelling and the garage, a temporary fence would create accessibility issues for one of the owners, and draining the pool would create a falling hazard.
- 3.7.12. Temporary fencing would have made no practical sense because of the lack of any imminent threat or additional risk to that already in place for the 16 years prior and during which the authority considered the barrier to be compliant.
- 3.7.13. Temporary fencing would have involved damage to existing pavers, additional costs, and would need to be removed to allow contractors access.

Adherence with Form 13:

- 3.7.14. The wording of the notices (relating to the fines) is not in accordance with Form 13 of the *Building (Forms) Regulations*.
- 3.7.15. The notices are also not in accordance with Form 13 regarding reference to a building consent.
- 3.8. The owners advised that a building consent application was made and was granted for the necessary work, that work was completed in May 2022 and a code compliance certificate was issued in June 2022. The owners described various issues related to remedying the non-compliant pool, including costs, aesthetics and design constraints.
- 3.9. The owners raised various concerns about the authority's actions and decision-making, both in relation to their own circumstances as well as those of other pool owners, including the suggestion by the authority in November 2019 that alarms on the doors would have brought the pool barrier into compliance. The owners also raised issues regarding loss of value in the property and stated their views on negligence and liability – all of which are outside the ambit of this determination.

3.10. The owners submit that the authority has made misleading statements in its submissions to this determination:

- The authority has misrepresented the level of safety risk posed by the pool not having a compliant barrier. The owners submit that children do not frequent the property and gave reasons for this.
- The owners refute the implication that they have not been pursuing a remedy since being notified in 2019.

The authority

3.11. Regarding the application of the legislation, the authority submitted (in summary):

3.11.1. Compliance with section 162C is an ongoing obligation that rests on those in control of the pool at any given time (ie those listed in section 162C(4)), and there are specific offence provisions (section 168(1AA)) for failing to comply with a notice to fix concerning a barrier to residential pools.

3.11.2. Section 162C(4) does not restrict the issuance of a notice to fix only to those responsible for the original installation of the pool; the focus is on the current and future safety of the pool and is tied to the ongoing obligations of those in control of the pool.

3.11.3. *Poseidon* is not relevant to this application because in the *Poseidon* case “there were no safety issues of concern and, of course, no ongoing inspection obligations for the council or ongoing compliance obligations for the owner”. The authority noted a judicial review of the *Poseidon* case was underway.

3.11.4. With the insertion of the special provisions for residential pools in the Act, the authority can issue a notice to fix without first applying to have a code compliance certificate reversed. In support of this view, the authority referred to Determination 2019/038⁹ and to debates during readings of the *Building (Pools) Amendment Bill* and what the authority considers was Parliament’s intention. In the authority’s view “it would make no sense if Parliament mandated authorities to carry out 3-yearly inspections of swimming pool barriers to ensure safety of children but provided no enforcement tools if the owner or occupier was either unwilling or unable to achieve compliance”.

⁹ Regarding the compliance of a 23-year-old pool fence. Issued 1 August 2019.

3.12. Regarding the form and content of the notices, the authority submitted (in summary):

Timeframe

3.12.1. The authority considers the timeframe in NF0402 to be reasonable given the matter is a safety issue and risks around pools increase during the warmer months.

3.12.2. The uncertain timeframe for remediation, coupled with the period of time since the owners were first notified of the non-compliance in 2019¹⁰, influenced the authority's decision to issue the notices to fix and the timeframes in the notices.

3.12.3. The covering letter with the notices advised that if the owners required more time to comply they should let the authority know so an extension could be considered.

3.12.4. On receipt of a remedial proposal with timeframes for completion from the owners, the date for compliance with NF0402 could be adjusted or the notice withdrawn.

Remedy

3.12.5. In *Andrew Housing Ltd v Southland District Council*¹¹, the Court noted that a notice to fix is capable of being complied with by meeting the performance criteria by a number of methods.

3.12.6. If the pool were decommissioned or converted to a water feature with a depth of water less than 400 mm, the provisions of the Act for residential pools would no longer apply and so the current non-compliance would no longer exist. The authority based the remedies on the current situation of the pool not having a compliant barrier.

3.12.7. It would not be practicable for authorities to add any number of variables of what an owner can do to remedy the non-compliance. The covering letter accompanying the notices did recommend the owners contact the authority before carrying out any work to discuss the various options available for achieving compliance. It is the owners' responsibility to design the remedial solution.

¹⁰ In response, the owners noted that the authority had not identified the immediate pool area as an issue in its 2019 inspection.

¹¹ *Andrew Housing Ltd v Southland District Council*, 23 November 1995, Tipping J (52/95).

3.12.8. Previous determinations¹² have stated that it is not for the notice to fix to specify how non-compliances are remedied, and that this is for the owners to propose. Also, the owners had signalled a design solution in previous correspondence with the authority¹³. The authority submits:

What is crucial, is that the particulars of the notice to fix fairly tell the recipient of the notice what provision of the Act or the code has allegedly not been complied with¹⁴ and it is submitted there can be no question that the [authority] met its obligations.

3.12.9. The drafting of the notice is clear and practical – if a barrier is erected to restrict access to the pool by children, it would also go some way to preventing an accidental fall into the pool if it were drained (which was an option available to the owners).

Adherence with Form 13¹⁵

3.12.10. Form 13 is designed as a structure only, because every non-compliance is different. The authority has a degree of discretion around what to include in the notice, and the prescribed form (Form 13) does not reflect the changes to the Act relating to residential pools that came into effect in 2017.

3.12.11. There is no “active building consent” for the property or pool, and therefore referencing a building consent is not relevant.

4. The relevant legislation

4.1. The relevant sections of the Building Act that provide for the issuing notices to fix are sections 164 and 165:

164 Issue of notice to fix

(1) This section applies if a responsible authority considers on reasonable grounds that—

¹² Such as Determination 2015/062: The issuing of a building consent and a code compliance certificate for a 14 year-old-house. Issued 5 October 2015.

¹³ The authority has referred to correspondence dated 28 September 2021, which is after the authority issued the notices.

¹⁴ *Andrew Housing Ltd v Southland District Council* [1996] 1 NZLR 589 (HC).

¹⁵ The Form is prescribed in the *Building (Forms) Regulations 2004*.

(a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); ...

(2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—

(a) to remedy the contravention of, or to comply with, this Act or the regulations; ...

165 Form and content of notice to fix

(1) The following provisions apply to a notice to fix:

(a) it must be in the prescribed form:

(b) it must state a reasonable timeframe within which it must be complied with:

...

(d) if it requires building work to be carried out, it may require the making of an application for a building consent, or for an amendment to an existing building consent, for the work:

(e) if it requires building work to be carried out, it must require the territorial authority, the regional authority, or both to be contacted when the work is completed:

...

(g) if it relates to a residential pool, it may direct that the pool be drained of water and be kept empty (until the requirements of section 162C are complied with).

(2) Nothing in subsection (1) limits or affects the generality of section 164.

4.2. Section 163 defines ‘specified person’ for the purpose of issuing a notice to fix as follows:

specified person means—

(a) the owner of a building:

(b) if a notice to fix relates to building work being carried out,—

(i) the person carrying out the building work; or

(ii) if applicable, any other person supervising the building work:

(c) if a notice to fix relates to a residential pool, a person referred to in section 162C(4).

4.3. The person(s) referred to in section 162C(4) are:

(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.

4.4. In this case, the notices were issued to the owners for contravening section 162C. Section 162C provides:

(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).

...

5. Discussion

The issue of the notices to fix

- 5.1. The purpose of the special provisions for residential pools¹⁶, as set out in section 162A, is to prevent drowning of and injury to young children by restricting unsupervised access to residential pools¹⁷ by children under five years of age.
- 5.2. The legislation requires that every pool that is filled or partly filled with water must have physical barriers that restrict access to the pool by unsupervised children under five years of age¹⁸. This requirement remains throughout the lifetime of the pool. The Act states that territorial authorities must ensure that pools within their jurisdiction are inspected at least once every three years to determine whether the pool has barriers that comply with the requirements of section 162C¹⁹.
- 5.3. Section 164 provides for the territorial authority to issue notices to fix to the specified person concerned²⁰ if the person is contravening or failing to comply with the Act or the regulations. In relation to pool barriers, if a territorial authority determines the pool does not have a compliant barrier as required by section 162C, the territorial authority can issue a notice to fix to the specified person concerned.
- 5.4. The provisions do not limit authorities' powers to a particular point in time – a notice to fix can be issued at any time during the lifetime of the pool if the pool barrier does not meet the compliance requirement in section 162C.
- 5.5. These ongoing provisions ensure the effectiveness of the barrier to restrict access to the pool by unsupervised young children does not become compromised over time, whether because of lack of maintenance, alterations, or for some other reason. On that basis, I am of the view that a notice to fix for contravention of section 162C can be issued irrespective of whether or not the pool barrier is the subject of an existing code compliance certificate. This approach aligns with the legislative intent of the special provisions for residential pools, which is for

¹⁶ Sections 162A to 162E.

¹⁷ The special provisions for residential pools apply to pools with a maximum depth of water of 400 mm or more (section 162B).

¹⁸ Section 162C(1).

¹⁹ Section 162D(1).

²⁰ If a notice to fix relates to a residential pool, a specified person means a person referred to in section 162C(4).

residential pools to have a compliant barrier throughout the lifetime of the pool to prevent death or injury of young children.

- 5.6. In this case, there is no suggestion that the non-compliance of the barrier has come about over time, such as through a failure to maintain the barrier or an alteration. At the time the authority issued the notices, the pool barrier was in the same configuration as when the code compliance certificate was issued, and it encompasses the same area. I have already determined the pool barrier does not comply²¹. I reiterate that no determination has been sought about the authority's decision to issue the building consent and code compliance certificate, and the code compliance certificate is still in existence.
- 5.7. The owners contend that the pools provisions do not contemplate the circumstances that have arisen in this case. With reference to section 162C(2)(b)²², the owners submit that the Act does not contemplate non-compliant building work being approved by the issue of a code compliance certificate, and that therefore the owners' particular situation is not captured "by the applicability of section 162C". The owners have also suggested that a code compliance certificate issued in error for a non-compliant pool barrier would first have to be reversed before a notice to fix could be issued.
- 5.8. I disagree with the owners' suggestion that a code compliance certificate issued in error for a non-compliant pool barrier could mean section 162C does not apply. Section 162C(1) is the provision requiring pools to have a physical barrier, and it applies to every residential pool that is filled or partly filled with water. The provision applies regardless of when the pool was constructed, erected or installed, and regardless of whether it has ever been the subject of a building consent, code compliance certificate, or certificate of acceptance.
- 5.9. The reference to code compliance certificates is in section 162C(2)(b). Section 162C(2) provides two means by which a physical barrier to a residential pool can comply, and it must comply with one or the other – that is by either meeting the requirements of the Building Code currently in force (s162C(2)(a)) or by meeting the requirements of the Building Code that were in force when the pool was constructed, erected or installed (s162C(2)(b)). Subsection 162C(2)(b) does not limit the application of section 162C(1) in the manner the owners appear to be suggesting; rather it sets the performance requirements for pool barriers at a particular point in time so that if or when performance requirements in the

²¹ See Determination 2021/015: Regarding the compliance of an existing pool barrier. Issued 19 July 2021.

²² The means by which the compliance requirements are met are set out in section 162C(2) and in the savings provision for existing residential pools, section 450B.

Building Code change in the future there is no requirement to upgrade what had previously been compliant pool barriers.

- 5.10. As a means of establishing compliance for the purpose of section 162C(1), subsection (2)(b) is only available subject to certain criteria being met – ie the pool must have been constructed, erected, or installed after 1 September 1987, and have been subject to a building consent, code compliance certificate or certificate of acceptance. These criteria do not limit the application of section 162C(1).
- 5.11. In this case, the pool was constructed sometime after September 2004 and a code compliance certificate was issued in 2006. For that reason, section 162C(2)(b) was available as means to establish compliance for the purpose of section 162C(1). However as already noted, I have previously determined that the pool barrier does not comply with the Building Code that was in force at that time nor with the Building Code currently in force.
- 5.12. I acknowledge the owners' point that the Act would not contemplate a code compliance certificate or certificate of acceptance being issued in error. However, the test in section 162C(2)(b) is whether the barrier complies with the Building Code that was in force, not simply whether it was constructed under a building consent or has been certified. Accordingly, I am of the opinion that a wrongly issued code compliance certificate does not mean that section 162C(2)(b) is not available as a means to establish compliance with section 162C(1) – it is the requirements of the Building Code that were in force at that time, rather than the certification itself, that is the test against which the physical barrier is measured. For the same reason, I am also of the view that a notice to fix in this circumstance can be issued when no determination has been made to reverse the authority's decision to issue the code compliance certificate.
- 5.13. I have concluded that contravention of section 162C can occur despite there being a code compliance certificate, both in circumstances where there has been some change to the barrier over time or where the barrier was never compliant. Accordingly, I am of the view that a notice to fix for non-compliance with section 162C can be issued even when there is an existing code compliance certificate.
- 5.14. This leaves me with the question of whether a notice to fix for non-compliance with section 162C can be issued to an owner of the pool who was not responsible for carrying out the building work.
- 5.15. The owners are of the view that because they were not responsible for carrying out the building work and had purchased the property with a code compliance certificate in place, they should not now be penalised by the authority's decision

to issue the notices to fix for building work that the authority had earlier decided was compliant. In the owners' opinion, this is shifting accountability for an error from the authority to them.

- 5.16. An authority has the power to issue a notice to fix where the authority considers on reasonable grounds that an owner is contravening or failing to comply with the Act or Building Code (section 164(1)(a)). The owners contend that "contravening or failing to comply" requires some action or failure or omission on their part and therefore the authority would need to establish the owners had actively contributed to the non-compliance of the pool barrier.
- 5.17. The owners cite *Poseidon* in support of their view. They acknowledge the circumstances in that case differ but consider there is a legal principle of not taking enforcement action against an innocent party which also applies to this case.
- 5.18. Previous determinations²³ have taken the approach that once a code compliance certificate has been issued, a building consent authority or territorial authority is unable to take any action in respect of that building work unless:
- the building is dangerous, earthquake-prone, or insanitary
 - the owner decides to alter the building, change its use, or change its intended life
 - the decision to issue the code compliance certificate is reversed by way of a determination.
- 5.19. That approach is in line with that of the District Court in *Poseidon*, and means that a subsequent owner is not held responsible for non-compliant building work undertaken by a previous owner.
- 5.20. In *Poseidon*, the District Court concluded²⁴ that to "hold a subsequent owner responsible to fix the defective work of a previous owner in those circumstances would ... strain the ordinary meaning of the words 'contravening'".
- 5.21. The matter before the court involved a notice to fix that had been issued to a subsequent owner²⁵ for contravention of section 17. Section 17 concerns the carrying out of building work and provides "All building work must comply with

²³ See for example 2010/053: The issue of a notice to fix for a house with a code compliance certificate. Issued 12 July 2010.

²⁴ At [76].

²⁵ A notice to fix issued to a previous owner was reissued to the new owner after the property was sold.

the building code to the extent required by this Act, whether or not a building consent is required in respect of that building work.”

- 5.22. Section 17 applies to the owner who obtains the building consent, the person carrying out the building work and if applicable any other person supervising the building work²⁶. It is those people to whom a notice to fix could be issued for contravention of section 17. This reflects the overarching permitting regime of the Act – which allows people to carry out building work subject to certain requirements being met and provides for building consent authorities to have oversight of the building work, to issue notices to ensure compliance is achieved, and to certify the completed compliant building work.
- 5.23. However, the Act also encompasses two compliance regimes through provisions that create ongoing obligations for building owners. One of these is the building warrant of fitness regime²⁷ which concerns the inspection, maintenance and performance of certain safety and essential systems known as specified systems²⁸. The provisions and offences concerning compliance schedules and building warrants of fitness are not limited to the persons who carried out the building work, supervised the work or to whomever owned the building at the time the work was done. It is the current owner of the building who is, among other things, required to obtain a compliance schedule, ensure the performance of the specified systems, and have a current building warrant of fitness.
- 5.24. The special provisions for residential pools is the other ongoing compliance regime in the Act. The ongoing obligation to have a barrier that restricts access by unsupervised young children to residential pools, and for territorial authorities to ensure those obligations are being met on an ongoing basis, was originally established when FOSPA was enacted²⁹. On 1 January 2017, FOSPA was repealed and its compliance regime was brought into the Building Act through the insertion of the special provisions for residential pools in sections 162A to 162E.
- 5.25. Section 162C(1) requires every residential pool must have physical barriers that restrict access to the pool by unsupervised children under five years of age. The means by which this mandatory obligation is met for pools (other than small heated pools) are set out in section 162C(2) and in the savings provision in section 450B. Section 162C(4) lists those people who must ensure the obligation is met. Section 162D(1) requires territorial authorities must ensure residential pools within their jurisdiction are inspected at least once every three years to determine

²⁶ Section 163.

²⁷ Carried over from the Building Act 1991.

²⁸ Sections 105 and 110.

²⁹ Refer sections 8 and 10 of the Fencing of Swimming Pools Act 1987.

whether the pool has a barrier that complies with the requirements of section 162C. Together these provisions ensure that barriers to pools are regularly inspected and remain compliant throughout the lifetime of the pool.

- 5.26. In circumstances where those ongoing compliance obligations are not being met, a person is “contravening or failing to comply” with section 162C of the Act and a notice to fix can be issued. The persons to whom that notice can be issued are listed in section 162C(4). Those persons include not only the owner of the pool, but also the pool operator, the owner of the land on which the pool is situated, the occupier of the property, a lessee of a residential tenancy or purchaser of a pool subject to a hire purchase agreement. It is apparent from the persons identified in section 162C(4) that for contraventions of section 162C a notice to fix can be issued to persons other than the person who owned the property at the time the building work was carried out.
- 5.27. In contrast to a contravention of section 17, it is the persons responsible for, in control of, or in possession of a residential pool that does not have a compliant barrier who can be issued the notice to fix for not complying with section 162C, rather than the person who has carried out or supervised the construction of the pool or barrier.
- 5.28. The matter of who is responsible for bringing about the non-compliance of the pool barrier does not detract from the requirement for the owners’ pool (if it is to remain) to have a compliant barrier restricting access of unsupervised young children. The purpose of issuing a notice to fix is to ensure non-compliance is remediated. While I have some sympathy for the owners in this particular situation, any matters of cost or liability are outside those that I can consider in making this determination and do not affect how the relevant provisions are applied.
- 5.29. The ability of an authority to issue a notice to fix requiring residential pools to have a compliant barrier is an important tool in ensuring that people who use the dwellings can do so safely. This is one of the primary purposes of the Act in section 3, and reflects the purpose of the special provisions for residential pools, “to prevent drowning of, and injury to, young children by restricting unsupervised access to residential pools by children under 5 years of age”.
- 5.30. The owners have also submitted that a dangerous building notice under section 124 of the Act would have been a more appropriate mechanism for addressing the non-compliant barrier than the issuing of the notices to fix. I disagree with the owners on this point.

- 5.31. The Act clearly provides for notices to fix to be issued when a residential pool does not have a compliant pool barrier, and in my opinion, these are the relevant powers for authorities to exercise rather than the powers relating to dangerous buildings. The provisions for notices to fix in subpart 8 are broadly worded to apply in a range of situations where an authority considers a specified person is contravening or failing to comply with the Act or regulations, with some specific to residential pools.
- 5.32. Section 165 provides the form and content of notices to fix and includes subsection (g) which allows a notice to fix to include a direction that the pool be drained of water and kept empty until the requirements of section 162C are complied with. This is intended to address immediate risk to young children until a permanent solution is put in place. Also, as noted in paragraph 5.26, if a notice to fix relates to a residential pool, the specified person(s) to whom the notice can be issued³⁰ are specific to residential pools and differ from the person(s) to whom a dangerous building notice is issued³¹.
- 5.33. The owners also contend the reasonable grounds threshold in section 164(1) was not met because in the owners' opinion the authority's inspection in 2019 was "substandard" and the authority did not have all of the information it needed to issue the notices.
- 5.34. The notices to fix were issued on 22 September 2021, two months after the first determination was made that concluded the pool barrier was not compliant. I note that the determination itself provided comprehensive information on the pool barrier and the immediate pool area and was provided to the authority as a party to the determination.
- 5.35. In conclusion, I am of the view that the authority was correct to issue a notice to fix to the owners for contravention of section 162C on the grounds that the pool does not have a compliant barrier.
- 5.36. I note matters of liability relating to the construction and certifying of the non-compliant pool barrier are outside the ambit of a determination and the owners are pursuing this issue through other channels.

³⁰ See section 162C(4).

³¹ See section 125(2).

Form and content of the notices

5.37. The relevant section of the Act concerning the form and content of notices to fix is section 165:

165 Form and content of notice to fix

(1) The following provisions apply to a notice to fix:

(a) it must be in the prescribed form:

(b) it must state a reasonable timeframe within which it must be complied with:

...

(d) if it requires building work to be carried out, it may require the making of an application for a building consent, or for an amendment to an existing building consent, for the work:

(e) if it requires building work to be carried out, it must require the territorial authority, the regional authority, or both to be contacted when the work is completed:

...

(g) if it relates to a residential pool, it may direct that the pool be drained of water and be kept empty (until the requirements of section 162C are complied with).

(2) Nothing in subsection (1) limits or affects the generality of section 164.

5.38. The “prescribed form” referred to in subsection (1)(a) is Form 13 of the *Building (Forms) Regulations 2004* (see Appendix A for a full copy of Form 13).

5.39. Clause 6 of the *Building (Forms) Regulations* states:

6 Use of forms

(1) Form 1 may not contain any differences from the form that is prescribed.

(2) Use of any other form is not invalid only because it contains minor differences from a form prescribed by these regulations as long as the form that is used—

(a) has the same effect as the prescribed form and is not misleading; and

(b) contains all the information required by the prescribed form and the information is in the same order as appears on the prescribed form.

- 5.40. The provisions in the Act for notices to fix are broadly worded and empower an authority to issue a notice to fix if the authority “considers on reasonable grounds a specified person is contravening or failing to comply with this Act or regulations.” The notice must require the person “to remedy the contravention of, or comply with” the Act.
- 5.41. As the statutory requirements for a notice to fix do not prescribe the specific detail that must be included in the notice, an authority has a degree of discretion around what to include in the notice. Therefore, the authority must have reasonable grounds for issuing the notice, and must decide on the appropriate terms to be included in the notice. The authority is required to consider the matters listed in section 165 and the circumstances relating to the building work in deciding what the appropriate terms are for a notice to fix.

Remedies

- 5.42. Notice to fix NF0402 states that the remedy is to “install a suitable barrier to restrict access to the pool by children under 5 years of age in compliance with s 162C of the Act and clause F9 of the NZ Building Code.” Because section 162C requires residential pools to have physical barriers that restrict access to the pool by unsupervised children under five years of age, and because any new building work to install a barrier must comply with clause F9 of the Building Code, I am of the opinion the remedy is appropriately worded in terms of the contravention.
- 5.43. I accept that various options were available to the owners to resolve the matter of the pool not having a compliant barrier, and the owners could elect any lawful means by which the non-compliance could be resolved.
- 5.44. The owners have submitted the remedies were limited to putting in a suitable barrier and did not provide for other options, and that they could have chosen to decommission the pool or convert it in some way so that it was no longer a pool³². As noted by the authority, if the pool was decommissioned or converted to something other than a pool there would be no requirement for the owners to comply with section 162C and so the notices would then no longer apply.
- 5.45. In my view, including in the notice a statement to the effect that the owners could pursue any other lawful option to resolve the non-compliance, would have been helpful to ensure the owners were aware that other options were available to

³² As defined in section 7.

them. However, the omission does not mean the notice to fix is invalid. To be clear, I am not suggesting that it is for authorities to include design solutions in notices to fix or that it is for authorities to detail how non-compliant building work could be made compliant; rather I am of the view that it is important that stated remedies do not unintentionally limit the way in which an owner might resolve non-compliant work.

- 5.46. The remedy in NF0401 required a temporary barrier to be installed “around the pool area ... to restrict the passage of children under 5 years of age and provide safety from falling”. While it may have been more precise to refer to the area that needed to be enclosed by the temporary barrier as “surrounding the pool or immediate pool area”, I do not consider this to be critical to the validity of the notice.
- 5.47. Section 165(g) provides that the notice to fix “may direct that the pool be drained of water and be kept empty (until the requirements of section 162C are complied with)”. Under the heading “To remedy the contravention or non-compliance you must:”, the notice included draining the pool as an option for the owners to consider, but stated it was not a requirement in order to comply with the notice to fix.
- 5.48. The remedy required a temporary barrier be erected to restrict access to the pool by children and to “provide safety from falling”. A barrier restricting access to the pool by children is a requirement if the pool has water in it, and a barrier to provide safety from falling into the pool would only be necessary if the pool was drained. The remedy appears to combine both as requirements to satisfy the notice.
- 5.49. As an aside, I note that a temporary fence suitable for the purpose of restricting the passage of children to the pool while a more permanent solution is developed may not be a suitable fence for protecting people from an accidental fall into an empty pool.
- 5.50. Despite the way these two remedies have been drafted in the notice, because the notice has since been rescinded there would be no value in modifying that notice or reversing the decision to issue the notice in the expectation of it being reissued with modified wording.
- 5.51. For completeness, regarding section 165(1)(d) and (e), both notices directed the owners to advise the authority once the work was completed and that a building consent was likely to be required.

Timeframe for complying with the notices

- 5.52. Section 165(1)(b) provides that a notice to fix must state a “reasonable timeframe” within which the notice must be complied with. What is “reasonable” will depend on the circumstances of the case³³.
- 5.53. This requires authorities, on a case-by-case basis, to turn their minds to the practicalities of the specified person(s) carrying out the necessary steps to resolve the non-compliance or contravention within a given timeframe. In some circumstances the necessary work may be simple and able to be completed easily without requiring specialised tools, or specialist experience or knowledge. Other circumstances may be more complex and thus require more time. For example, where the scope of work is extensive or is particularly complex, where there is a need for technical specialists to be involved or for further investigation, or circumstances outside the person’s control, such as holiday periods for example, that impact on the ability to remedy the situation.
- 5.54. Both notices were issued on 22 September 2021. The remedy in NF0401 (in short) was for installation of a “temporary fence” around the pool area – that notice had a timeframe of three weeks (ie 12 October 2021).
- 5.55. NT0402 required (in short) the installation of a “suitable barrier” as a permanent means of restricting access to the pool by unsupervised young children – with a timeframe of 10 weeks (ie 1 December 2021).
- 5.56. It is logical that the timeframe for erecting a temporary barrier is shorter than that for a permanent solution. A temporary barrier surrounding a pool or immediate pool area is intended to address the immediate risk to young children until a permanent solution is in place. A temporary barrier is less likely to require input from technical specialists and in many cases may be undertaken by a building owner reasonably quickly and easily. In contrast, a permanent solution may require more time to design, is likely to require a building consent, and its completion may depend on availability of various specialists and tradespeople with appropriate skills and experience to carry out the work.
- 5.57. I am of the view that the timeframe of three weeks for a temporary barrier to be erected was reasonable in terms of it being achievable to erect a temporary barrier, within that timeframe, and at that time of the year in that district³⁴. I acknowledge that the installation of a temporary barrier would reduce the width

³³ *Hauraki District Council v Pykett* DC Waihi (2008) at [42].

³⁴ When the notices were issued, Tasman district was in Covid Alert Level 2.

of the access pathway and a temporary solution to that issue would have also been necessary for the owners to continue to access the dwelling.

- 5.58. The authority submits the timeframe for NF0402 was reasonable when taking into account that the owners were aware of the matter since the failed inspection in November 2019. However, the owners disputed the authority's view on compliance and sought a determination on that matter. The determination, which concluded the barrier was not compliant, was issued on 19 July 2021. I also acknowledge the point made by the owners that there were additional compliance matters addressed in the determination that had not been identified in the authority's November 2019 inspection, meaning in 2019 the owners were not aware of the extent of the non-compliance that would need to be remedied.
- 5.59. The authority also submits the timeframe was reasonable on the grounds it did not know how the owners proposed to remedy the non-compliance and the uncertainty of a timeframe from the owners. The authority considers "from a practical perspective" that 10 weeks was enough time for the matter to be resolved. The authority also reiterated the covering letter included an offer for the owners to approach the authority if more time was needed.
- 5.60. The owners made a number references to technical issues that they believe mean that 10 weeks was not reasonable. They also referred to a document they provided to the authority in December 2019, outlining potential solutions to the non-compliance of the pool barrier, in support of their view that the authority would have been aware of the challenges involved in remedying the non-compliance.
- 5.61. In a submission responding to the draft of this determination, the owners provided more detail about the factors they consider relevant. Some factors relate to practical design requirements, such as retaining space at the pool edge for manoeuvring salt bags and cleaning, ensuring filter heads are located within the barrier and that drainage sumps remain clear, and having a suitable base on which to attach the fence. There are other consequential factors that arise from the proposal to install a fence around the pool, including moving the access path, removing some of an existing garden and reducing the size of the decks to accommodate a concrete nib for the fence.
- 5.62. I accept there are various issues that arise in a remedial situation which present design challenges that would not otherwise be present for a new build, and so the time required to remedy non-compliance for existing buildings is likely to be longer than if it was a new build. I also consider factors such as Covid-19 related supply issues and availability of appropriately qualified or skilled people to prepare

the design and carry out the work are relevant considerations for what is a “reasonable timeframe”.

- 5.63. Of the factors raised in the owners’ submissions, I do not consider matters related to aesthetics and personal choices are relevant considerations for the timeframe included in notices to fix. In general terms, I also do not consider a person’s ability to carry out the remedy from a financial point of view is a relevant consideration – it is something that an authority would not have knowledge of when issuing a notice to fix – though I acknowledge it may be a general consideration when the nature and scope of work required is extensive.
- 5.64. In my opinion, a 10-week timeframe to design, obtain consent and install a permanent barrier in this case would have been challenging to meet. In reaching that view I have taken into account practicalities such as the development of a feasible remedial design solution for this particular property, sourcing of materials and qualified or suitably skilled people to carry out the design and construction, time for a building consent application to be prepared and for the building consent to be processed and issued, and for the physical work to be carried out. Taking into account that NTF0401 was issued at the same time requiring a temporary barrier, a longer timeframe in NTF0402 for a permanent solution to be in place would have been reasonable.
- 5.65. I note the covering letter invited the owners to seek an extension of the timeframe. I consider this sufficient to address the matter of whether it was in fact feasible in the particular circumstances for the owners to complete the necessary design, consenting and construction of a compliant barrier in the 10 weeks provided for in NTF0402.
- 5.66. I note for completeness that the authority later rescinded NTF0401 – meaning there was no longer a requirement for the owners to install a temporary barrier around the pool. However, my consideration is limited to the timeframes included in the notices at the point they were issued.

Adherence to Form 13

- 5.67. The relevant form for notices to fix is Form 13 – a copy of which is appended to this determination.
- 5.68. The owners have raised two points concerning adherence to Form 13; that the notices do not refer to a building consent number, and the wording of the notices with regard to fines is not the same as Form 13.

5.69. In this case the building work was carried out under a building consent, but that building consent is no longer “open” or “operative” because the building work was completed and a code compliance certificate issued. For this reason, the authority contends the building consent number is not relevant and therefore does not need to be stated in the notice to fix.

5.70. Form 13 includes reference to the building consent under “Particulars of contravention or non-compliance” as follows:

Particulars of contravention or non-compliance

[Insert details of failure or error with reference to any relevant building consent]

5.71. The phrase “any relevant building consent” provides for notices to fix to be issued for a contravention of the Act in both circumstances involving building work that is subject to a building consent or building work that is undertaken without a building consent. Accordingly, having no building consent referenced would not necessarily mean a notice to fix was not valid.

5.72. If a notice to fix is issued for contravention of section 40, ie building work undertaken without a building consent when one was required, there is no “relevant building consent” to list on the notice. Likewise, if a notice to fix is issued for non-compliance with section 17, ie because building work was carried out that was not in compliance with the Building Code, it will not always be the case that the building work is the subject of a building consent – section 17 applies regardless of whether a building consent is required.

5.73. In contrast, where a building consent has been issued and the building work is not in accordance with the plans and specifications that accompanied the application for that building consent, the form provides for the relevant building consent to be identified. I note also it is not uncommon that building work carried out on one Lot is undertaken under separate building consents, particularly in larger developments, either at the same time or overlapping times. Citing the relevant building consent (when there is one) can help identify the particular building work for which a notice to fix has been issued and ensures property records are clear about the need to bring non-compliant building work into compliance before a code compliance certificate can be issued for the work carried out under the relevant building consent.

5.74. In this case, the contravention for which the notices were issued was not for building work that was being carried out under a building consent that was still operative – the building work had been certified when the authority issued the

code compliance certificate. In addition, in this case, the notices to fix were not issued in relation to the carrying out of building work under a building consent (section 40) or non-compliance with the building code (section 17), but rather in relation to the requirements of section 162C. Finally, there is no lack of clarity about what the notices to fix relate to – there is only one pool on the property that requires a compliant barrier.

5.75. Therefore, I conclude that the lack of reference to a building consent in the notices to fix NF0401 and NF0402 does not invalidate those notices.

5.76. Turning now to the wording of the notices regarding the fines. Under the heading “Further particulars”, both notices stated “If you do not comply with this notice you commit an offence under section 168(1AA) of the Building Act 2004 and may be liable to a fine of up to \$20,000 on conviction.

5.77. The prescribed form, Form 13, says

If you do not comply with this notice you commit an offence under section 168 of the Building Act 2004 and may be liable to a fine of up to \$200,000 and a further fine of up to \$20,000 for each day or part of a day that you fail to comply with this notice.

5.78. The wording in Form 13 largely follows the provision in section 168(2) for offences other than those concerning residential pools:

(2) A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$20,000 for every day or part of a day during which the offence has continued.

5.79. Section 168(1AA) and (1AB) inserted into the Act on 1 January 2017³⁵ concern residential pools:

(1AA) A person commits an offence who fails to comply with a notice to fix a (sic) means of restricting access to a residential pool.

(1AB) A person who commits an offence against subsection (1AA) is liable on conviction,—

(a) in the case of an individual, to a fine not exceeding \$20,000:

...

³⁵ By section 13(1) of the Building (Pools) Amendment Act 2016.

5.80. The wording in the prescribed form does not reflect this change in the legislation. However, the notices are correct in referencing section 168(1AA) and have stated the correct fine as per section 168(1AB)(a).

Conclusion

5.81. In conclusion, I am of the view that the authority's decision to issue notices to fix to the owners for contravention of section 162C was correct. This is notwithstanding the existing code compliance certificate and the fact that the owners were not responsible for carrying out the building work nor had taken some action that caused the barrier to not be compliant.

5.82. I conclude the notices were not invalidated by the lack of reference to a building consent or in relation to the wording about fines. I also consider the remedies provided for are appropriate in respect of the contravention, and the timeframe for complying with the notices in conjunction with the invitation for the owners to seek an extension was reasonable.

6. Decision

6.1. In accordance with section 188 of the Building Act 2004, I determine that the authority was correct to issue notices to fix NF0401 and NF0402 to the owners for contravention of section 162C, including the form and content of those notices, and I confirm those decisions.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 9 November 2022.

Katie Gordon
National Manager, Building Resolution

APPENDIX A: THE BUILDING ACT 2004

121 Meaning of dangerous building

(1) A building is dangerous for the purposes of this Act if,—

(a) in the ordinary course of events (excluding the occurrence of an earthquake), the building is likely to cause—

(i) injury or death (whether by collapse or otherwise) to any persons in it or to persons on other property; or

(ii) damage to other property; or

(b) in the event of fire, injury or death to any persons in the building or to persons on other property is likely.

(2) For the purpose of determining whether a building is dangerous in terms of subsection (1)(b), a territorial authority—

(a) may seek advice from employees, volunteers, and contractors of Fire and Emergency New Zealand who have been notified to the territorial authority by the board of Fire and Emergency New Zealand as being competent to give advice; and

(b) if the advice is sought, must have due regard to the advice.

124 Dangerous, affected, or insanitary buildings: powers of territorial authority

(1) This section applies if a territorial authority is satisfied that a building in its district is a dangerous, affected, or insanitary building

(2) In a case to which this section applies, the territorial authority may do any or all of the following:

(a) put up a hoarding or fence to prevent people from approaching the building nearer than is safe:

(b) attach in a prominent place on, or adjacent to, the building a notice that warns people not to approach the building:

(c) except in the case of an affected building, issue a notice that compiles with section 125(1) requiring work to be carried out on the building to –

(i) reduce or remove the danger; ...

(4) issue a notice that complies with section 125(1A) restricting entry to the building for particular purposes or restricting entry to particular persons or groups of persons.

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.

164 Issue of notice to fix

(1) This section applies if a responsible authority considers on reasonable grounds that—

(a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or

(b) a building warrant of fitness or dam warrant of fitness is not correct; or

(c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.

(2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—

(a) to remedy the contravention of, or to comply with, this Act or the regulations; or

(b) to correct the warrant of fitness; or

(c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.

(3) However, if a responsible authority considers that it is more appropriate for another responsible authority to issue the notice to fix, it must—

(a) notify the other authority that it holds that view; and

(b) give the other authority the reasons for that view.

(4) The other responsible authority referred to in subsection (3) must issue the notice to fix if it considers that this section applies.

165 Form and content of notice to fix

(1) The following provisions apply to a notice to fix:

(a) it must be in the prescribed form:

(b) it must state a reasonable timeframe within which it must be complied with:

(c) if it relates to building work that is being or has been carried out without a building consent, it may require the making of an application for a certificate of acceptance for the work:

(d) if it requires building work to be carried out, it may require the making of an application for a building consent, or for an amendment to an existing building consent, for the work:

(e) if it requires building work to be carried out, it must require the territorial authority, the regional authority, or both to be contacted when the work is completed:

(f) if it relates to building work, it may direct that the site be made safe immediately and that all or any building work cease immediately (except any building work necessary to make the site safe) until the responsible authority is satisfied that the person carrying out the work is able and willing to resume operations in compliance with this Act and the regulations:

(g) if it relates to a residential pool, it may direct that the pool be drained of water and be kept empty (until the requirements of section 162C are complied with).

(2) Nothing in subsection (1) limits or affects the generality of section 164.

168 Offence not to comply with notice to fix

(1AA) A person commits an offence who fails to comply with a notice to fix a means of restricting access to a residential pool.

(1AB) A person who commits an offence against subsection (1AA) is liable on conviction,—

(a) in the case of an individual, to a fine not exceeding \$20,000:

(b) in the case of a body corporate, to a fine not exceeding \$60,000.

(1) A person commits an offence if the person fails to comply with any other notice to fix under this Act.

(2) A person who commits an offence under subsection (1) is liable on conviction to a fine not exceeding \$200,000 and, in the case of a continuing offence, to a further fine not exceeding \$20,000 for every day or part of a day during which the offence has continued.

Section 168(1AA): inserted, on 1 January 2017, by section 13(1) of the Building (Pools) Amendment Act 2016 (2016 No 71).

Section 168(1AB): replaced, on 8 June 2021, by section 45 of the Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Act 2021 (2021 No 21).

Section 168(1): amended, on 1 January 2017, by section 13(2) of the Building (Pools) Amendment Act 2016 (2016 No 71).

Section 168(2): amended, on 1 January 2017, by section 13(3) of the Building (Pools) Amendment Act 2016 (2016 No 71).

Section 168(2): amended, on 1 July 2013, by section 413 of the Criminal Procedure Act 2011 (2011 No 81).

APPENDIX B: BUILDING (FORMS) REGULATIONS 2004

Form 13

Notice to fix

Sections 164 and 165, Building Act 2004

To: *[name and address of owner]*

***And to:** *[name and address of person carrying out or supervising the building work]*

The building

Street address of building:

Legal description of land where building is located:

Building name:

Location of building within site/block number:

Level/unit number:

Particulars of contravention or non-compliance

[Insert details of failure or error with reference to any relevant building consent]

To remedy the contravention or non-compliance you must: *[state any building work that must be carried out and whether a certificate of acceptance must be applied for]*

This notice must be complied with by: *[date or time frame]*

Further particulars

*You must contact the *[state whether the persons to whom the notice is given must contact the territorial authority for the district within which the building is situated, the regional authority for the region within which the building is situated, or both]* on completion of the required building work.

*All building work must cease immediately until the authority that issued this notice is satisfied that you are able and willing to resume operations in compliance with the [Building Act 2004](#) and regulations under that Act.

*The following building work must cease immediately until the authority that issued this notice is satisfied that you are able and willing to resume operations in compliance with the [Building Act 2004](#) and regulations under that Act: *[insert details of building work]*

If you do not comply with this notice you commit an offence under [section 168](#) of the Building Act 2004 and may be liable to a fine of up to \$200,000 and a further fine of up to \$20,000 for each day or part of a day that you fail to comply with this notice.

Signature:

Position:

On behalf of: *[name of territorial authority]*

Date:

*Delete if inapplicable.

Schedule Part 2 form 13: amended, on 14 April 2005, by [section 15\(2\)](#) of the Building Amendment Act 2005 (2005 No 31).