

29 October 2015

To: **Secretariat**  
**Local Government and Environment Committee**  
**Parliament House**  
**Wellington**

**Submission of the Christchurch City Council on the Building (Pools) Amendment Bill**

**Introduction**

1. The Christchurch City Council (**the Council**) thanks the Committee for the opportunity to make this supplementary submission.
2. The Council wishes to appear in support of its submission, either in person or via an audio or videoconference submission, and will be represented by Councillor Ali Jones.
3. The Council supports many of the proposals in the Bill, including:
  - The repeal of the Fencing of Swimming Pools Act 1987 (**the FOSPA**), and inclusion of pools provisions into the Building Act 2004 (**BA04**). Among other things this means Council no longer needs to deal with exemption applications (although waivers of the Building Code and determinations under the BA04 can still be used for anyone in an unusual situation); this will save a Council in both elected member time and Council expense;
  - Providing a 5 year timeframe for Council inspections, and although spa pools and hot tubs are included within the 'residential pool' definition, the Council does not have to inspect spa pools and hot tubs, only other residential pools;
  - Greater flexibility around what can be a pool barrier, and the requirement that doors opening directly to the pool area from a building will need to have handles young children cannot reach and be self-closing or fitted with an alarm (removing the current complex sliding and bi-fold doors provisions);
  - That the provisions apply to accommodation buildings such as hotels and motels but not to non-residential pools. This is sensible as there have been no drownings in non-residential pools due to young children gaining unsupervised access to these pools. (As noted in the supporting information, all of the drownings of young children in non-residential pools occurred where caregivers had already taken their child into the pool facility.);
  - Requiring pool manufacturers and retailers to supply information, and associated provisions for enforcement against manufacturers and retailers;

- That the notice to fix and infringement regime in the Building Act can be used for enforcement, but also providing for prosecutions in rare cases where infringement notices are not sufficient to result in a breach being remedied.
4. The 2013 discussion document proposed that the term 'immediate pool area' be replaced, and the Council supported that proposal but had alternative suggestions for the definition than the discussion document. This phrase and definition remains in the Bill, but the Council now accepts this position. Even though this wording has caused confusion in the past, a body of case law and determinations have now built up, and will make it easier to interpret and enforce by Councils. The wording in the definition has been amended slightly to better align with the findings in the cases and determinations.
  5. However, there are some matters the Council suggests need further consideration, in transitioning from the FOSPA, and some improvements that can be made to further clarify the intent of the Bill.
  6. The Council also supports the indication in supporting information on the Ministry of Business, Innovation and Employment website that after the Bill is passed (and presumably before the Bill comes into force), they will consult on new Acceptable Solutions to support the new Building code provisions. It is noted that this will draw on industry best practice, and as reflected in New Zealand Standard NZS 8500:2006 ('Safety barriers and fences around swimming pools, spas and hot tubs') (**NZS 8500**) as well as the equivalent Australian Standards.
  7. The relationship between NZS 8500 and the new provisions of the BA04 and Code need to be clarified through the acceptable solution, given that there are no references to NZS8500 in the Act. If it is not there is the potential for further duplication of regulation, and lack of clarity for Councils.

#### **Definition of 'pool' - man-made lakes should be clearly excluded**

8. The material supporting the Bill identifies the intention for the new provisions not to cover garden ponds and other water hazards. For example, the regulatory impact statement says:

*"95 The Act was intended to apply to swimming pools and spa pools, but has, on occasion, been applied to garden ponds and other water hazards because they have been assessed as being:*

- *manmade*
- *deeper than 400mm*
- **capable of being used** *for swimming, wading, paddling or bathing*
- *associated with a home.*

*96 Examples of where the Act has been interpreted to apply to garden ponds and other water hazards includes:*

- *A 2004 coroner's report found that a garden pond where a child had drowned was subject to the Act*
- *Departmental guidance on the Act was amended following the coroner's report, and states that, "Ornamental ponds, deeper than 400mm, and not intended for swimming, paddling, wading or bathing are not exempted if they are used in association with a house or other specified building." (Department of Internal Affairs 2005)*

• In 2011, Kapiti Coast District Council obtained a legal opinion stating that, "in our view a stormwater detention pond and other similar water bodies are covered by the definition of 'pool' in the Act." (Kapiti Coast District Council 2011) .....

102 This RIS analyses the following options relative to the status quo:

• Option 5.1 (recommended): do not require owners to restrict access to garden ponds or other water hazards."

9. Although the definition of pool no longer uses "capable of being used for swimming", etc the definitions of pool and residential pool means some water hazards/excavations, such as many man-made lakes, can still come within these definitions:

*"pool means—*

*(a) any excavation or structure **of a kind normally used** for swimming, paddling, or bathing; or*

*(b) any product (other than an ordinary home bath) that is designed or modified to be used for swimming, wading, paddling, or bathing"*

*"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"***

10. The wording highlighted above, "normally used", may exclude man-made lakes, however, there are examples of man-made lakes that are constructed as part of a subdivision that suggest swimming will be a normal use of that lake. It would also seem to be a correct interpretation to say that the normal use of a natural lake includes swimming or paddling.
11. The advertising literature for these subdivisions will often identify that the purpose built lake that is part of the subdivision is able to be used for water activities including swimming. Although the lakes will generally not be on land that also contains an abode, they will come within (c) as they are generally on land adjacent to other land that contains an abode. The lake is meant to be used in conjunction with the other land or abode, particularly when the subdivision is one where the lake is private and can only be used by landowners in the subdivision, or their guests.
12. However, there will be examples where a property owner constructs a lake on the same property as the house. If the correct interpretation is that a lake is 'normally used' for swimming (or paddling at least) then lakes on the same property as a house will also be caught. It is not clear when a garden pond would no longer be a garden pond and would be classed as a lake.
13. It seems the intention of the Bill and its surrounding information is to exempt man-made lakes as an 'other water hazard'. When something has the appearance of a natural lake it should be excluded from the definition of pool and not require barriers, even if it is to be used for swimming or paddling. It would be prohibitively expensive to provide barriers for such an excavation, and it is likely property owners would simply seek waivers of the building code for such structures, making more work for Councils. Just because it is a man-made lake and not a natural lake should not make a difference.

14. The Council identified these types of water bodies in its submission in 2013 suggesting they also needed to be exempt from the Act, and gave examples of the lake at the Pegasus subdivision and Lake Hood. Another example is the gated community of Northbrook Waters in Rangiora. This subdivision incorporates a man-made lake, which is promoted as for water skiing, but is also used for triathlon swimming and general swimming. A holiday house website identifies that a special amenity of a Northbrook waters home is that it is "only a 100 metre walk to private freshwater lake for swimming, absolutely secure and safe."
15. The Council submits that a clear exemption for man-made lakes/larger water bodies, possibly by reference to a water body that is over a certain size, should be included in the Bill. This will remove arguments between Councils and landowners in relation to such excavations.

### **Definition of 'abode' and pools that are in a pool building**

16. The Council considers the definition of 'abode' is not sufficiently clear in relation to whether pools in buildings such as a pool house are clearly covered by the Bill.
17. At present section 5 of the FOSPA contains the following exemption: "*(e) any pool that is wholly enclosed within a building that is used principally for a purpose or purposes not related to the use of the pool*". Pools in a pool building only used for the purpose of housing the pool and associated pool activities are not exempt under section 5, and are required to comply with the FOSPA.
18. Abode or place of abode is defined as the place used predominantly as "*a place of residence or abode, **including any appurtenances belonging to or enjoyed with the place***".
19. The meaning of abode was discussed in *Re Wairarapa Election Petition [1988] 2 NZLR 74* as being 'the house or place where a person lives'. An appurtenance is defined in the Shorter Oxford English Dictionary (6<sup>th</sup> Ed) as "*1 LAW. A minor property, right, or privilege, subsidiary or incidental to a more important one; an appendage. Usu in pl.*"
20. It seems from this that a pool house/building separate from the main residence is probably an appurtenance and would come within the definition of 'abode', but the Council considers this could be made clearer. The word appurtenance does not currently appear in the Building Act or the building code<sup>1</sup>. A term that is already used in this legislation may provide more clarity to anyone reading the new provisions, and used to dealing with building legislation.
21. The term 'outbuilding' found in the classified uses in section A of the building code states:

#### *"7.0 Outbuildings*

*7.0.1 Applies to a building or use which may be included within each classified use but are not intended for human habitation, and are accessory to the principal use of associated buildings. Examples: a*

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<sup>1</sup> The Act includes the following definition of appurtenant structure: 'in relation to a dam, means a structure that is integral to the safe functioning of the dam as a structure for retaining water or other fluid'

*carport, farm building, garage, greenhouse, machinery room, **private swimming pool**, public toilet, or shed."*

22. The definition of abode could be amended to refer to "*any outbuildings belonging to or enjoyed with the place*", instead of appurtenances, possibly with a definition of outbuilding added to the Act. Alternatively a definition of 'appurtenances' could be included in the Act to make it clear pool buildings and the like are covered.

#### **Existing indoor pools in homes, new sections 162C, 450B and new F9.3.4 of the code**

23. The Council considers it is not sufficiently clear whether pools that are inside a home are now intentionally included in the Bill as a pool requiring a barrier. It is reasonably clear that new indoor pools are covered as the definition of 'residential pool' provides:

*"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"*

(However, as discussed below proposed clause F9.3.4 needs additional wording added to make it clear that the whole pool barrier could comprise of the building.)

24. However, the position is not as clear when it comes to existing pools. There seem to be conflicting statements on MBIE's website, but also confusion between proposed new sections 162C(2), 162C(4) and 450B.
25. The questions and answers information on MBIE's website states: "*the rules will apply to indoor home pools (other than an ordinary home bath), **including existing indoor pools**. For example, indoor pools with self-closing or alarmed doors address the risk these pools would pose to any young children in the home*". However, the very next bullet point on the website states there is "**no change to the requirements for existing pools**. Existing pools will be deemed to be compliant if they meet the requirements of the Fencing of Swimming Pools Act 1987 (or if the council gave an exemption).
26. Nevertheless, on page 16 of the questions and answers document also states: "*Existing swimming pools (**other than indoor pools**) may continue to comply with existing rules*."
27. Overall, the comments suggest any existing indoor pools will no longer be exempt, and must comply with the new provisions. Given that existing indoor pools did not previously have to comply with the FOSPA there may not be many pools that would already have self-closing or alarmed doors, and presumably will now have to install them in order to meet the requirement in proposed new section 162C(1) (that every residential pool must have physical barriers that restrict access to the pool by unsupervised children under 5).
28. Then section 162C(2) states that the means of restricting access in subsection (1) "*must comply with (a) the applicable requirements of the building code....or (b) if the pool was constructed, erected, or installed before 1 January 2017, section 450B*". 'Applicable requirements' is defined in subsection (4) as '*the*

*requirements that applied when the pool was constructed, erected, or installed".* It appears if a pool existed before 1 January 2017, only s162C(2)(b) (bringing in s450B) applies to the pool and how it is to comply, not s162C(2)(a) (and (4)).

29. Section 450B, which sets out the savings provisions for residential pools, then apparently incorrectly refers to section 162C(2)(a) (it should be (b), not (a)?). Section 450B(2) also states that an existing pool is deemed to comply with the new requirements if it "*continues to comply with the requirements of the Fencing of Swimming Pools Act 1987 as that Act was in force immediately before 1 January 2017, subject to:*

*(a) any exemption that-*

- i. had been granted under section 6 or clause 11 of the Schedule of that Act; and*
- ii. was subsisting immediately before 1 January 2017; and*

*(b) the conditions of any such exemption"*

30. Neither this subsection, nor subsection (3) reference what applies to existing pools that were previously exempt under section 5 of the FOSPA. It is arguable that in order to continue to comply with the requirements of the FOSPA, those pools can therefore continue to be exempt as provided for in section 5 of the FOSPA. That would mean an existing indoor pool would not have barriers that comply with the Act.
31. In addition the relationship between section 450B(2) and (3) is not clear. Do both apply to existing pools, or are they alternatives? (For ease of reference, section 450B is set out in full in the attachment to this submission.)
32. One further area that could be clarified to support this change is the amendments to the building code. F9.3.4 refers to "*where a building forms part of an immediate pool area barrier...*". If a pool is inside a home then generally the whole of the building is the barrier. The Council recommends this wording is changed so it reads "*where a building forms **all or** part of an immediate pool area barrier...*".
33. Council supports the inclusion of indoor pools in homes into the Act (both new pools and existing pools, that are not spa pools, hot tubs, or baths), and no longer being exempt, but submits that section 450B needs to be clarified to ensure existing pools are clearly captured and that the relationship between subsections (2) and (3) is clarified, and the words "all or" added to clause F9.3.4.

### **Councils should not have to obtain a District Court warrant to inspect a residential pool inside a home**

34. The amendments to section 222, and new section 222A do not exempt Councils from the need to comply with section 226. Section 226 states that:
- "Despite section 222, an authorised officer may not enter a household unit that is being used as a household unit without—*
- (a) the consent of the occupier of the household unit; or*
  - (b) an order of a District Court made under section 227."*

35. The Council should not have to seek an order from the District Court if consent is not obtained from the owner to inspect an indoor pool. After making the normal requests for consent, if consent is not forthcoming, the Council should be able to issue the owner a notice of inspection that states the Council's intention to inspect the indoor pool in accordance with section 222A, and asking the owner to acknowledge receipt of the notice and advise the Council of a day and time that suits them for the inspection. If an owner does not acknowledge receipt and advise the Council of a suitable inspection date and time, this failure is an offence that can be enforced by an infringement notice, and a prosecutable offence for any ongoing failure.

#### **Clarifications re notice to fix - s168**

36. The proposed addition of section 168(1AA) should use wording similar to the wording currently used in section 168(1), as the current wording: '...a notice to fix a means of restricting access to a residential pool', does not appear to make sense. The Council submits the wording of s168(1AA) could be:  
"A person commits an offence if the person fails to comply with a notice to fix requiring that person to comply with s162C or, if applicable, to drain the pool of water and keep it empty until the requirements of section 162C are complied with."

#### **Savings provision needs to allow review of exemptions granted under the FOSPA**

37. A number of exemptions granted by the Council under section 6 of the FOSPA include the condition that: "The owners must notify the Council if there is a change of occupancy at the property, or the property is sold, at which time the exemption shall be reviewed."
38. Section 6(3) of the FOSPA currently provides: "*Any exemption granted or condition imposed under this section may be amended or revoked by a territorial authority, by resolution.*"
39. The Bill is not clear what the position is in respect of Councils' ability to review and revoke exemptions it has granted or conditions of exemptions once the Bill comes into force.
40. It is possible that some exemptions will no longer be required under the new pool requirements. That is, the conditions of the exemption would mean the pool now complies in any event, or the exemption is no longer needed, for example, exemptions for spa pools.
41. The Council should have time to review existing exemptions and revoke those that are no longer needed, effective as at the same date as the commencement of the Bill. However, for other exemptions, particularly if they have the condition set out above, it may not be fair to the owner to review or revoke the exemption as at 1 January. However, it may be appropriate to revoke the exemption at a later date and ask the owner to ensure the pool complies with the new requirements.

42. The savings provision in clause 13 of the Bill (new section 450B) needs to be clarified to confirm that for any exemption that subsists as at 1 January 2017, the powers in section 6(3) of the Act continue to apply, despite the repeal of that section.

### **Proposed Building Code amendments**

43. The Council acknowledges that the proposed building code changes will be supported by a new acceptable solution but recommends the following should be better defined in the Bill:
- As discussed above, adding "all or" to F9.3.4 - "*Where a building forms **all or** part of an immediate pool area barrier...*"
  - A 'reasonably foreseeable load', as used in F9.3.5 (b) should be defined in the code so it is clear to owners (and Councils if they do have to inspect a spa pool) what 'load' a cover for a spa pool or hot tub is expected to withstand.

### **Conclusion**

44. If you require clarification of any points raised in this submission, or any additional information, please contact Judith Cheyne, (Senior Solicitor, Legal Services Unit, ph 03 941-8649, email: [judith.cheyne@ccc.govt.nz](mailto:judith.cheyne@ccc.govt.nz)).

Yours faithfully



**Peter Sparrow**  
**Director, Building Control and Rebuild**  
**CHRISTCHURCH CITY COUNCIL**



## Appendix

### Section 450B - Savings provision for 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 comply with section 162C(2)(a) if it continues to comply with the requirements of the Fencing of Swimming Pools Act 1987 as that Act was in force immediately before 1 January 2017 subject to—

- (a) any exemption that—
  - (i) had been granted under section 6 or clause 11 of the Schedule of 10 that Act; and
  - (ii) was subsisting immediately before 1 January 2017; and
- (b) the conditions of any such exemption.

(3) An existing pool is deemed to comply with section 162C(2)(a) if all of the following apply:

- (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 20 within 1.2 m 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; and
- (c) any ladder or other means of access to the interior of the swimming pool—
  - (i) can be readily removed or made inoperable; and
  - (ii) is removed or made inoperable whenever the pool is not intended to be in use.