

Performance Solutions Pool Fencing

By Peter Gillett

Local governments are increasingly being asked to approve alternative solutions to a Building Code pool barrier requirement under r.51(5) of the *Building Regulations 2012* (**Regulations**). Pursuant to r.51(5), a permit authority may only approve an alternative solution to a Building Code pool barrier requirement if the permit authority is satisfied that the alternative solution complies with the relevant performance requirement.

The issue that arises, therefore, is whether local governments are obliged to consider applications for approval of alternative solutions for pool barriers and, if so, how and when should such approvals be issued.

Background

The Department of Mines, Industry Regulation and Safety has recently released an Industry Bulletin titled '*Applicable building standards: Safety barriers for post – May 2016 private swimming pools*'. In that Bulletin, the Department states that a building surveyor must not sign a Certificate of Design Compliance (**CDC**) or Certificate of Building Compliance (**CBC**) if their certification relies upon a performance solution for pool safety barriers unless the performance solution has been approved by the permit authority.

We understand the Department has advised local government building surveyors that they will need to consider and, in effect, 'pre-approve' alternative solutions for pool barriers in order for those 'approved' alternative solutions to then form part of a CDC or CBC submitted with an application for a building permit or an application for a building approval certificate respectively.

The Legislation

The legislative basis for the Department's position appears to be contained in regulations 31C(1) and 31G(2) of the Regulations. Those provisions came into effect on 1 May 2016. The legislation

Pursuant to regulations 31C(1) and 31G(2) of the Regulations, an alternative solution cannot be used to comply with a Building Code pool barrier requirement unless the alternative is an approved barrier solution.

'Approved barrier solution' is defined under r.3 of the Regulations to mean, in effect, an alternative solution approved by a permit authority under r.51(5) of the Regulations. As a result, a CDC which purports to rely upon an alternative solution to a Building Code pool barrier requirement which has not been approved by the permit authority under r.51(5) will not comply with sections 16(e) and 19(3) of the Act and will be an invalid application. Likewise, a CBC which purports to rely upon an alternative solution to a Building Code pool barrier requirement which has not been approved by the permit authority under r.51(5) will not comply with sections 54(3) and 57(3) of the Act and will be invalid.

In those circumstances, how the permit authority deals with the application will depend upon whether the permit authority is

prepared to approve alternative solutions for Building Code pool barrier requirements under r.51(5) of the Regulations.

Dealing with applications

If the permit authority is prepared to approve alternative solutions for pool barrier requirements, then the permit authority could advise the applicant that they will first need to apply for approval of the proposed alternative solution for the pool barrier under r.51(5) of the Regulations. If the proposed alternative solution is subsequently approved by the permit authority, then the certified building permit application together with the CDC specifying the approved alternative solution for the pool barrier could be re-submitted.

If, on the other hand, the permit authority is not prepared to entertain or approve alternative solutions for pool barrier requirements, then the application should be returned to the applicant with an explanation as to the effect of regulations 31C or 31G, as the case requires. If the permit authority subsequently receives an application for approval of the alternative solution under r.51(5), the permit authority can then refuse that application.

Importantly, there is no right of review to the State Administrative Tribunal of a decision to refuse an application for approval under r.51(5) of the Regulations. That is because an application under r.51(5) does not fall within the review provision contained in Part 9 of the Act. Accordingly, if a permit authority adopts a policy position that it will not approve applications made under r.51(5), then it can refuse to process certified building permit applications and applications for building approval certificates which incorporate alternative solutions for pool barriers on the basis that those application do not include the requisite approval under r.51(5) are, therefore, invalid.

Note, however, that where an uncertified application for a building permit is made which proposes an alternative solution, the permit authority is under an obligation to consider and assess that alternative solution. If additional information is required in order to properly assess and determine whether the proposed alternative solution complies with the relevant performance requirement, the permit authority should request further information under s.18 of the Act.

Technically, in order to properly comply with r.31C, where an uncertified application is made which includes an alternative solution to a pool barrier requirement, the permit authority should first require the applicant to apply for and obtain approval for the proposed alternative solution under r.51(5). Once that approval is obtained, the permit authority could then consider and approve the permit application. In reality, where an uncertified application which includes an alternative solution to a pool barrier requirement, it would be appropriate for the permit authority to consider the proposed alternative solution as part of the CDC process.

Note, however, that where an uncertified application incorporating an alternative solution is refused, the applicant will have a right of review to the State Administrative Tribunal as the alternative solution forms part of the application for the building permit.

Finally, if a permit authority is prepared to approve alternative solutions for pool barrier requirements, then the permit authority must ensure the power to approve alternative solutions under r.51(5) of the Regulations is properly delegated to the appropriate officer or officers in accordance with s.127 of the Act.

Liability

Section 144(1) of the Act provides, relevantly:

'This Act does not operate to create a duty of a permit authority –

- 1. to check the accuracy of a fact, or the soundness of an opinion, asserted in a certificate of design compliance, a certificate of construction compliance, a certificate of building compliance or a technical certificate signed by a specialist; or*
- 2. to form its own opinion on a matter mentioned in section 19(3), ... or... [section] 57(2)(a), (b) or (c), (3), (4)(a) or (b) or (6)..."*

While s.144 expressly provides that the Act does not create a duty to check the accuracy of certain matters, where a permit authority has approved an alternative solution for a pool barrier requirement, the permit authority will have made an assessment and formed an opinion about whether the alternative solution complies with the relevant performance requirements.

While an employee of a permit authority will be protected by s.145 of the Act in the event an approved alternative solution is subsequently found to be defective in some respect, the permit authority will be exposed to potential liability in those circumstances. That is an issue a permit authority may wish to consider when deciding whether it will or will not approve applications made under r.51(5).

Conclusion

The starting point for a local government is to consider whether it is prepared to approve alternative solutions for pool barrier requirements. If the answer to that question is yes, then the local government can approve applications made under r.51(5) and advise applicants who submit certified building permit applications incorporating alternative solutions which have not been approved that they will first need to apply for approval of the alternative solution under r.51(5).

Alternatively, local governments which are prepared to approve alternative solutions for pool barrier requirements could advise applicants to submit an uncertified building permit application incorporating the proposed alternative solution. The local government could then consider and approve the alternative solution as part of the uncertified building permit approval process.

If the local government is not prepared to approve alternative solutions for pool barrier requirements, then the local government can refuse any applications made under r.51(5) and return certified building permit applications and applications for building approval certificates which incorporate alternative solutions on the basis those applications are incomplete. Local governments which are not prepared to approve alternative solutions for pool barrier requirements need to be aware, however, that applicants will have a right of review to the State Administrative Tribunal where an uncertified building permit applications is refused.

The information contained in this article should not be relied upon without obtaining further detailed legal advice in the circumstances of each case. For further information please contact Peter Gillett by email to pgillett@mcleods.com.au.

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