

Determination 2024/066

The authority's decision to refuse an amendment to a building consent to increase the immediate pool area

21 Branksome Place, Aokautere, Palmerston North

Summary

This determination considers the authority's decision to refuse an application for an amendment to a building consent proposing to extend and increase the immediate pool area. The determination discusses the reasons for refusal, and whether the additional spaces enclosed can be included within the 'immediate pool area' as defined by the Act.



Figure 1: Fireplace and dining area added to the immediate pool area

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 (eg 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, Andrew Eames, Principal Advisor Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹
- 1.2. The parties to the determination are:
 - 1.2.1. D and K Mulcahy (“the owners”), the owners of the property who applied for this determination.
 - 1.2.2. Palmerston North City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination arises from a dispute between the parties regarding an application for an amendment to a building consent to extend the immediate pool area from what was shown in the building consent. The authority disagrees the spaces to be included within the immediate pool area are spaces that can be contained within such an area. The authority refused the owners’ application for an amendment to the building consent.
- 1.4. The matter to be determined, under section 177(1)(b) and (2)(a) of the Act, is the authority’s decision to refuse the application for an amendment to a building consent on 5 April 2023.
- 1.5. In deciding this matter, the determination will consider the reasons for the refusal and whether the additional spaces set out in the amended building consent application can be considered part of the ‘immediate pool area’ as defined by the Act.

Matters outside this determination

- 1.6. The following is outside the scope of this determination and I have, therefore, not considered:

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

- 1.6.1. The building consent BC210851 issued on the 6 September 2021, including the originally proposed immediate pool area and pool barriers.
 - 1.6.2. The Building Code compliance of the extended/additional pool barriers set out in the amendment BC210851.A1, including the compliance of the additional sliding door of the dwelling external wall that forms part of the barrier.
 - 1.6.3. Two gates in the pool barrier (one located at the northern end of the pool area where the barrier meets the external wall of the dwelling, and the second to the southern end of the pool area where the glass barrier meets the trellis fencing). It appears the gates were omitted from the building consent and amendment to the building consent.
- 1.7. I have not considered any other aspects of the Act, or of the Building Code.

2. The building work and background

- 2.1. On 6 September 2021 the authority issued building consent BC210851 for the construction of an in-ground swimming pool, spa pool and associated pool barrier to the north-west elevation of the existing dwelling. The immediate pool area was enclosed by a pool barrier consisting of aluminium pool fencing, existing wooden 'trellis type' fencing in the spa area and the external walls² of the dwelling, including two windows and three sliding doors and one single leaf door. The immediate pool area was approximately 175m².
- 2.2. The pool fencing was completed September 2022. The completed work is that set out in the application for amendment to the building consent, refer to paragraphs 2.3.1 to 2.3.3 below.
- 2.3. On 13 September 2023 the owners applied to the authority for an amendment to building consent BC210851. The amendment:
 - 2.3.1. Increases the size of the immediate pool area by approximately 73m² (now 248m² in total) by enclosing the area north of the pool. The additional area included in the immediate pool area includes an outdoor fireplace and dining area.
 - 2.3.2. Incorporates more of the dwelling's external wall to form the pool barrier, including an additional sliding door to the rumpus room.
 - 2.3.3. Changes part of the pool barrier (fences west and south of the pool) from aluminium fencing to a glass barrier.

² The owners have submitted windows and doors in the external wall of the house would be secured using the relevant stays and method as outlined within Acceptable Solution F9/AS1.

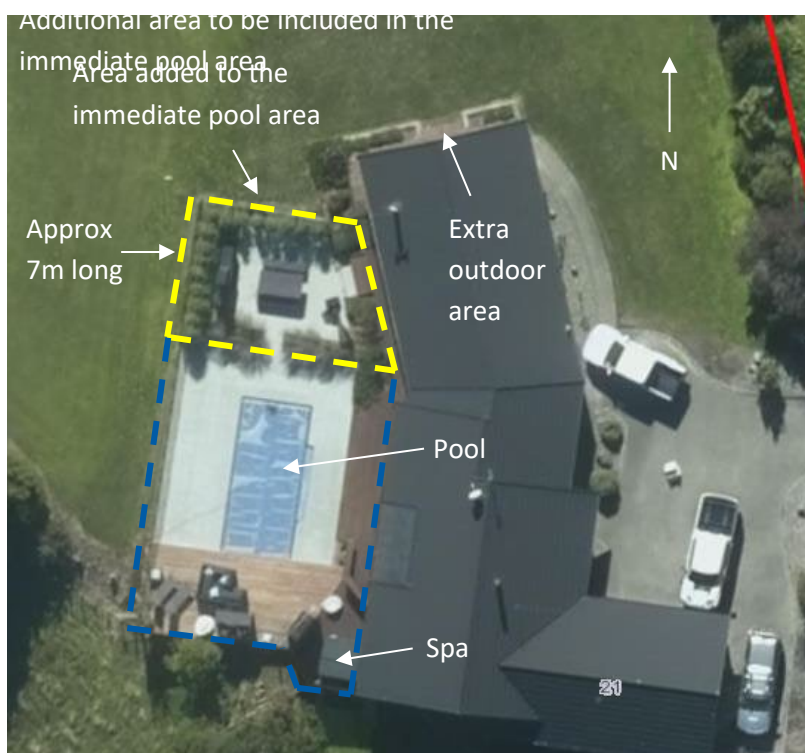


Figure 2: Aerial view of the house and pool area (not to scale)

- 2.4. On 18 September 2023 the authority requested further information from the owners about the junctions between the different fence types and a tree on the outside and next to the pool barrier:

“Please review and update the pool fencing area. NZBC F9.3.1 requires the immediate pool area to be fenced. Dining [sic] area, cooking area and additional rooms off the dwelling are not considered part of the immediate pool area. Refer to past determination 2022/030³.”

- 2.5. On 19 September 2023 the owners responded. In respect of the extended immediate pool area the owners stated:

“While some similarity in the situation exists between this application and past determination 2022/30, there is still a gulf of difference between them. [The determination] involved the addition of a complete secondary building (the pavilion) with full unrestricted access into the pool area which included a full kitchen, tv/entertainment, and other activities that one would not typically associate with the use of the pool...”

³ Determination 2022/030 Regarding the authority’s decision to refuse to issue two amendments to a building consent in respect of the location of a pool barrier. 29 Kaimata Road, Bay View, Napier (Dated 22 December 2022).

As for the cooking aspect of the fireplace, it is a far cry from the full cooking facility as present in 2022/30. No food preparation surface is present, nor washing implements like a sink or dishwasher. I see this as a significant difference... As for the "additional rooms", they are indeed not part of the pool area and constitute part of the barrier for the pool. As noted in our application, doors onto the pool area are to be fitted with alarms, restrictors, and self-latching devices as per F9/AS1 requirements."

2.6. On 20 September 2023 the authority responded:

"The proposed amendment includes a new deck area, which comes up to the edge of the pool and could be considered part of the pool area. However information provided showing a separate dining and cooking... are not considered part of the immediate pool area."

2.7. On 26 September 2023 the owners responded:

"The seating area... is primarily there to serve as an area to rest and entertain adults within the vicinity of the pool, allowing for the direct and immediate supervision of the pool. The adjoined fire... has the capacity to cook like a barbeque but is not suitable for the preparation of food or cleaning. There are multiple determinations about this topic as you have mentioned. From what I have read the general pattern is:

- Larger area than strictly necessary with table and chairs in reasonably close proximity is considered okay.
- Larger area with other activities like trampolines, or outdoor dining areas at a substantial distance to the pool are not compliant.

Given that the additional area is within 5m of the pool, I... consider this to be in close proximity and a practical reasonable distance to keep the area unspashed by users of the pool.

To summarise:

- The tabled area is for use in conjunction with the pool specifically.
- It could be used for activities not associated with the pool, but the immediacy of access to it (within about 6-7 walking steps) to the pool makes it more likely to be used for pool activities.
- While the fireplace could be used to cook its primary purpose is to provide warmth to those using the table and chairs.
- The lack of obstruction between the pool and this area further supports its intended purpose.

2.8. On 28 September 2023 the authority responded.

"... the area wanted to be included in the amendment is outside the immediate pool area, therefore does not comply with NZBA F9. Please review and update."

- 2.9. On 5 April 2024 the authority subsequently refused the application for an amendment to the building consent (numbered BC210851.A1). The letter stated the authority's reason for refusal as:

“[the authority] has not received a response to the request for further information date 28th September 2023”

3. Submissions

The owner

- 3.1. In their application for determination, the owners submit (in summary):
- 3.1.1. The key issue is a disagreement in the overall pool area size, and the fireplace and seating area incorporated in the extended area.
 - 3.1.2. The extended area consists of a stone table and chairs, one outdoor fireplace, and an extra area of the house wall which includes entry/exit points from the house.
 - 3.1.3. The area is kept within reasonable confines that the enclosed pool area only contains activities that should be used in conjunction with the pool.
 - 3.1.4. The extended area is only a dining area. The authority has referred to the area as a dining, cooking area or food preparation area, but there is a lack of other facilities such as cold storage, clean running water, or heat.
 - 3.1.5. In respect of Determination 2022/030, there are some similarities but is not a reasonable comparison, because in that case a full-fledged kitchen area was included, which has limited view of the pool, and included an access way.
 - 3.1.6. The size of the area relevant, the initial building consent allowed for a total approximately 175m², with the amendment adding an additional 70m². Further, this additional area is insignificant compared to the other areas on the property in excess of 4000m².
 - 3.1.7. The only interpretation is how much of the area could be considered immediate, the table and fireplace area being a place for adults to entertain and supervise the use of the pool area. The area is open plan allowing ample line of sight to the pool for early intervention and prevention.
 - 3.1.8. Access to the remainder of the backyard is available through a doorway at the northern end of the dwelling. A covered area exists on the same northern section as the backyard accessway that could be used for other

outdoor seating/dining. I note this area appears to be accessed from a rumpus room.

The authority

- 3.2. In their submission, the authority considers (in summary):
- 3.2.1. Building consent was issued for a swimming pool barrier. The consented barrier included pool fencing and a portion of the dwelling to enclose the immediate pool area. No gate access was included in this building consent.
 - 3.2.2. A number of requests for further information were made and no acceptable response was provided. The reason for refusal “was given” as “the pool barrier proposed does not comply with the building code clause F9 Restricting access to residential pools”⁴.
 - 3.2.3. The amendment increases the size of the immediate pool area and now extends the entire western elevation of the dwelling, this includes five doors into the pool area. The pool fence does not include a gate; thus, the only access to the pool area is via the dwelling’s external doors.
 - 3.2.4. The original consented pool area would already encompass an area for entertainment and sunbathing associated with pool use.
 - 3.2.5. In reliance of the Determination 2022/030, the extended immediate pool area extends to include the door to the rumpus room, being the dwellings living/entertaining area, and activities undertaken in the entertaining area could reasonably include young children.
 - 3.2.6. The extended pool area will encompass the whole outdoor entertainment area, which is adjacent to the living areas with a number of doors. In reliance of Determination 2018/006, considers the outdoor entertaining area will function as an extension to the living area of the dwelling.
 - 3.2.7. In conclusion, the amended pool area does not meet the requirements of Building Code Clause F9 because the immediate pool area is not isolated and the outdoor entertainment area is not considered an activity related to pool use.

⁴ I note it wasn’t until this determination arose that the authority made this statement and it was not set out in the notice issued to the owner.

4. Discussion

- 4.1. The matter to be determined is whether the authority was correct to refuse to grant the amendment to the building consent on 5 April 2023.

Relevant Legislation

- 4.2. Subpart 3 of the Act sets out the scheme for regulating building work through, among other things, building consents. Generally, building work must not be carried out without building consent (section 40 of the Act) except in certain cases (section 41), sections 44 and 45 set out when and how to apply for building consent, including that an amendment to a building consent is to be made as if it were an application for a building consent. Section 48 sets out the processing of an application for building consent, and sections 49 and 51 provides for the granting and issuing of a building consent.
- 4.3. If a building consent authority decides to refuse to grant an application for a building consent, section 50 of the Act states and requires:
- ... the building consent authority must give the applicant written notice of—
 - (a) the refusal; and
 - (b) the reasons for the refusal.
- 4.4. The dispute relates to the size of the immediate pool area and the additional activities to be included in the area, so Building Code Clause F9 *Means of restricting access to residential pools* is relevant. In particular:
- 4.4.1. Performance criteria F9.3.1 requires residential pools must have physical barriers that restrict access to pool or the 'immediate pool area' by unsupervised young children.
- 4.4.2. Performance criteria F9.3.2 requires barriers must surround the pool and may enclose the whole or part of the immediate pool area.
- 4.5. Section 7 of the Act defines the 'immediate pool area' see paragraph 4.16 below.

The authority's reasons for refusal were insufficient

- 4.6. In determining whether the authority was correct to refuse to grant the amendment to the building consent under section 50 of the Act, I need to consider the reasons given for that decision.
- 4.7. The authority's 5 April 2024 letter stated the reason for refusing to issue the amendment to building consent was because the authority had "not received a response to the request for further information date 28th September 2023".

- 4.8. A number of previous determinations⁵ have considered the requirements of section 50 and what is expected of a building consent authority when giving reasons for a refusal. Key points of a refusal include:
- 4.8.1. identifying aspects of the design that are non-compliant with the Act of Building Code, and
 - 4.8.2. made in writing so an owner is aware of any shortcoming with the application in order to obtain that building consent, and
 - 4.8.3. the owner should be given 'sufficiently explicit, specific and clear' reasons why compliance has not been achieved so they can remedy the situation.
- 4.9. I hold the view that where an authority makes a decision to refuse to grant an application for building consent (including an amendment), the owner must be given sufficiently explicit, specific and clear reasons why the authority believes the building work does not comply with the Act or Building Code. It is then for the owner to consider whatever measures may be necessary to remedy the situation. A generalised refusal that does not identify the non-compliance aspects of the design is not sufficient for an authority to meet its obligations under section 50 of the Act.
- 4.10. In this case, the authority, in my view, did not provide sufficiently explicit, specific and clear reasons for its refusal in its written notice of 5 April 2024 to meet its obligations under section 50 of the Act. The authority's written notice makes no mention of what or why particular aspects of the design did not comply with the Act or Building Code.
- 4.11. Despite my findings, another matter has arisen.

Building consent cannot be issued for building work already completed

- 4.12. The owners have stated the pool fencing was completed September 2022, and the owners applied for an amendment to their building consent in September 2023, after the work was already completed.

⁵ Determination 2024/041 *Regarding the authority's refusal to grant a building consent for building work to replace the existing fire alarm system in a cool store* from paragraph 5.59 onwards (dated 13 August 2024) and Determination 2021/010 *Regarding the refusal of a building consent for alterations to an existing students' hall of residence* from paragraph 6.12 onwards (dated 31 May 2021).

- 4.13. Previous determinations⁶ and the District Court in *Environment Waikato v Sutherland*⁷ have considered and found that a building consent authority cannot grant and issue a building consent retrospectively for building work that has already been carried out and completed. This is also true of an application for an amendment to a building consent, which is to be applied for and processed as if it were an application for a building consent.
- 4.14. In *Environment Waikato v Sutherland* the wording and scheme of the building consent provisions (sections 40 to 51) “do not allow for the issue of building consents after the work has been carried out”. This conclusion follows from:
- “the specific reequipment in s44(1) that application for a building consent must be made before the work begins;
 - the use of the future conditional tense in s49 (“*would be met*” if the work “*were properly completed*”);
 - the fact that an offence is complete under s40 once building work has been carried out without a building consent.”
- 4.15. The subject building work is already complete, and the authority is now unable to issue the application for an amendment to the building consent (numbered BC210851.A1), therefore it must be refused. Given this, under section 188(1)(a), I confirm the authority’s decision to refuse to issue the application for an amendment to the building consent, despite my findings that the authority, at the time, provided insufficient reasons for its refusal in accordance with section 50.

Additional area included in the immediate pool area

- 4.16. This determination arose because the parties dispute whether the dining and fireplace area is permitted to be part of the ‘immediate pool area’. The Act defines the ‘immediate pool area’ as “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”.
- 4.17. The High Court in *Waitakere City Council v Hickman*⁸ (“Hickman”) considered the interpretation and application of ‘immediate pool area’. However, it did so in relation to the now repealed Fencing of Swimming Pools Act 1987 (“FOSPA”).

⁶ Determination 2016/046 *The refusal to grant an amendment to a building consent for the use of imported composite slate roofing tiles on a house* at paragraph 8.9 to 1.12 (dated 26 September 2016), and Determination 2019/012 *Regarding the issuing of a building consent* (Dated 18 April 2019) and Determination 2013/029 *An authority’s refusal of an application for a discretionary exemption from the requirement to obtain a building consent for the construction of a bridge* (dated 26 October 2023).

⁷ *Environment Waikato v Sutherland* DC Wellington CIV-2010-085-629, 1 March 2011, which considered Determination 2010/002.

⁸ *Waitakere City Council v Hickman* HC Auckland CIV-2003-404-7266, 1 October 2004.

Previous determinations⁹ have considered variations between the definition of 'immediate pool area' in FOSPA¹⁰ and in the Act, concluding no interpretative significance and therefore consider the interpretative approach in *Hickman* to be the correct way to determine the permissible extent of an immediate pool area.

- 4.18. Following *Hickman*, an immediate pool area is determined firstly by use, being the activities carried out in relation to or involving the pool. It is a matter of degree whether an activity is sufficiently related to or involves the pool.
- 4.19. Activities that have a remote or an indirect association with the use of the pool, such as clothes line, vegetable garden or access way, are to be excluded from the immediate pool area. Activities that would ordinarily qualify as being carried out in relation to a pool include pool furniture, changing sheds, sunbathing areas or pool equipment. There are other activities that can be carried out, at times, in relation to or involving the pool but, at times, independently of the pool, such as barbecues or entertaining.
- 4.20. Secondly, *Hickman* acknowledges that the extent of the immediate pool area is not solely governed by use but is also limited to an area that is sufficiently confined so that it may properly be described as being in the 'immediate' area of the pool:
- [34] ... The further away one moves from the edge of the pool, the less likely it will be that an associated activity or purpose can be properly be said to be carried on "in conjunction with" the use of the pool and the less likely it is that the activity will be in sufficient proximity to the pool to be properly regarded as within the "immediate" pool area.
- 4.21. In summary, while the immediate pool area is determined by identifying the area surrounding the pool that is used for pool related activities, and also that area is 'subject to the issue of immediacy'; it must not extend further than can properly be considered as being 'immediate' to the pool.
- 4.22. It is not unusual to enclose some land, whether lawn or paved areas, inside the pool barrier as a place where people can, for example sit or sunbathe while using the pool. These uses have been considered in a number of determinations¹¹.
- 4.23. In this case, the immediate pool area has been extended to include an outdoor dining table and a fireplace. It is not unusual to include seating or tables beside a pool that will be used for entertainment in association with the use of the pool and allow supervision of the pool area. In respect of the use or activities proposed for the additional space, I consider the particular activity of outdoor entertaining in this

⁹ Determination 2022/011 *Regarding the authority's decision to issue a code compliance certificate for a pool barrier* at paragraph 5.26 to 5.29 (Dated 1 July 2022)

¹⁰ FOSPA defined the 'immediate pool area' as "the land in or on which the pool is situated and so much of the surrounding area as is used for activities or purposes carried on in conjunction with the use of the pool"

¹¹ Determination 2015/039 *The refusal to issue a compliance certificate and the issue of a notice to fix in respect of compliance of pool barriers to a swimming pool* at paragraph 6.12 (dated 29 June 2015)

case, which may take place, from time to time, in relation to or involving the use of the pool has a sufficiently close relationship with the pool.

- 4.24. In respect of being in 'the immediate', I consider the area of concern is not extensive, the area is open to view from other areas of the pool area and has ample line of sight to the pool for supervision of the pool. I note this may be subject to the owners maintaining the planting within the area, but that any changes would be identified in the periodic inspections of the pool barrier required by section 162D of the Act.
- 4.25. I note there are other areas on the property that can be used to entertain outside when not using the pool, including an extra outdoor area on the north elevation from the dwelling where people can be outside for other purposes and where children can play.
- 4.26. In this case, I consider the use and location of the area (incorporating the fireplace and dining area) added to the immediate pool area is consistent with the barbecues or entertaining use envisioned by Hickman. I therefore consider the increased area can be included in the 'immediate pool area', and in this respect complies with the definition set out in the Act.

5. Conclusion

- 5.1. The building work subject of the application for amendment to the building consent has been carried out and completed before the application was made. The Act does not provide the power to retrospectively issue a building consent (or an amendment) for works already completed. For this reason, I confirm the refusal of the application for amendment to the building consent BC210851.A1.
- 5.2. However, I have found the authority's reasons for refusal, in its written notice of 5 April 2024, were insufficient to meet their obligations under section 50 of the Act.
- 5.3. I also conclude the extended immediate pool area, incorporating the fireplace and dining area, complies with the definition of set out in the Act.

6. Decision

- 6.1. In accordance with section 188 of the Act, I determine the notice of refusal of 5 April 2024 contained insufficient reasons in accordance with section 50 of the Act. However, for the reasons set out in paragraph 5.1, I confirm the decision to refuse application for amendment to the building consent BC210851.A1 (albeit for a different reason than that relied on by the authority at the time it refused the application).

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 26 November 2024.

Andrew Eames

Principal Advisor Determinations