

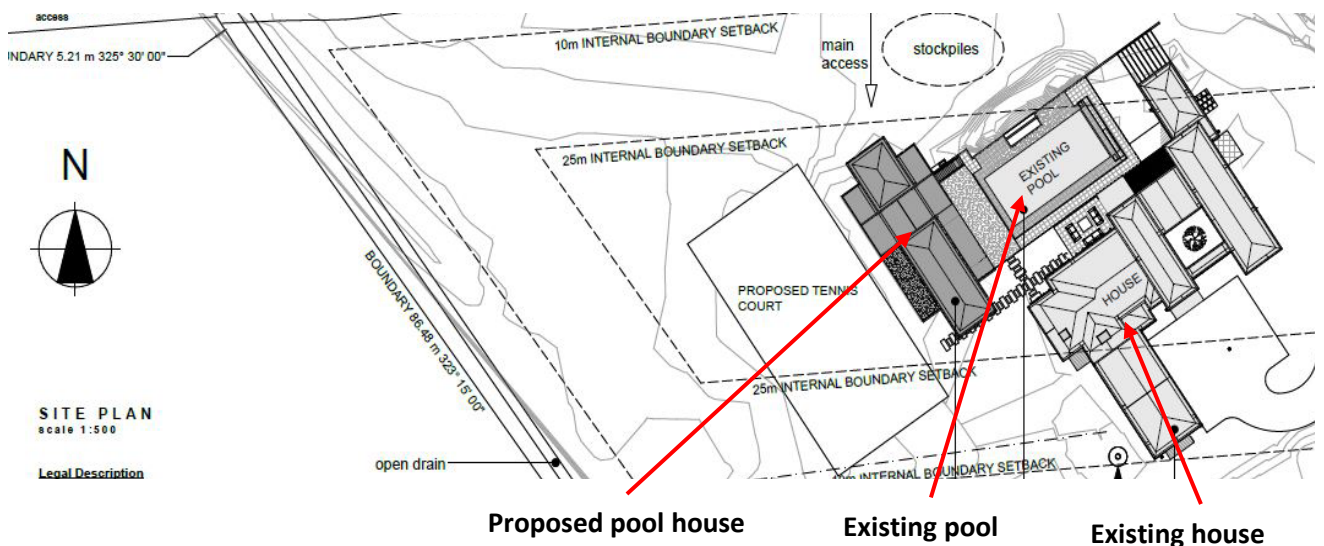
# Determination 2023/024

**Regarding the decision of the authority's proposed decision to refuse to issue a building consent in respect of the location of a pool barrier**

**360 Marshland Road, Christchurch**

## Summary

This determination considers the authority's proposed decision to refuse to issue a building consent for a pool house as compliance with clause F9 of the Building Code, *Restricting access to residential pools*, had not been demonstrated due to the lack of a barrier between the pool house and pool. The determination considers whether a pool house with bathroom, gym, changing facilities, kitchen/bar, lounge and roof deck, as well as rear patio area can be considered part of the immediate pool area.



**Figure 1: Site plan showing the proposed pool house and surrounding property**

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](http://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](http://www.building.govt.nz).

## 1. The matter to be determined

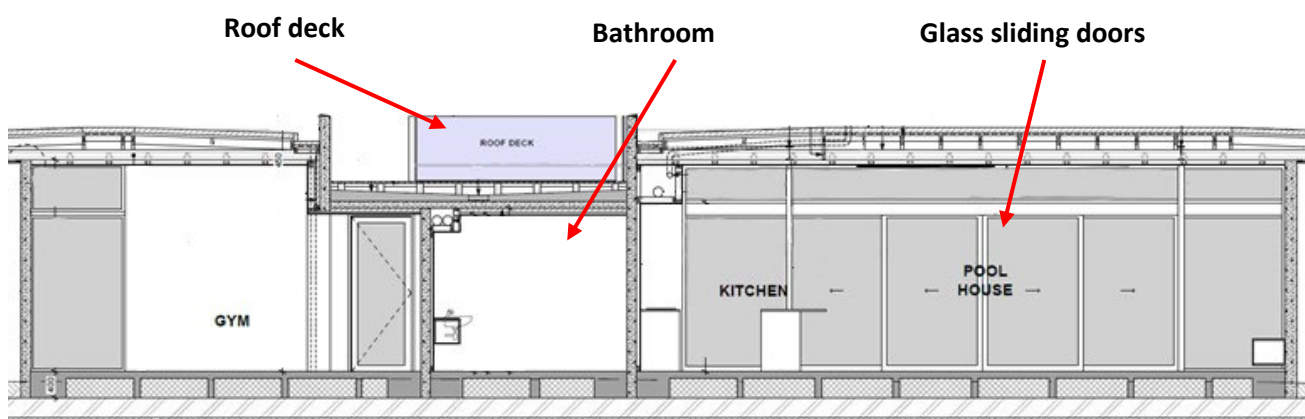
- 1.1. This is a determination made under due authorisation by me, Charlotte Gair, Manager Advisory, Ministry of Business, Innovation and Employment (‘the Ministry’), for and on behalf of the Chief Executive of the Ministry.<sup>1</sup>
- 1.2. The parties to the determination are:
  - 1.2.1. The owners of the house, C M Walsh, H G Walsh and C M Walsh (‘the owners’), acting through an agent, who applied for the determination.
  - 1.2.2. The Christchurch City Council (‘the authority’), carrying out its duties as a territorial authority or building consent authority.
- 1.3. This determination concerns the barrier restricting access to a residential pool (‘the pool’) and the proposed pool house to be constructed adjacent to the pool (‘the pool house’). The dispute arises from the authority’s proposed decision to refuse to issue the building consent (BCN/2021/4702) for the pool house as there was no barrier between the pool house and the pool.
- 1.4. The authority is of the view that the proposed work to construct the pool house does not comply with Building Code Clause F9 *Restricting access to residential pools*, as the pool house and other spaces contained within the proposed pool barrier cannot be considered to be part of the ‘immediate pool area’.
- 1.5. The matter to be determined, under section 177(1)(b) and (2)(d), is the authority’s proposed decision to refuse to issue the building consent for the construction of the pool house.
- 1.6. To decide this matter, I must consider whether the spaces contained within the proposed pool barrier (‘the pool barrier’) can be properly considered to be part of the ‘immediate pool area’.

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

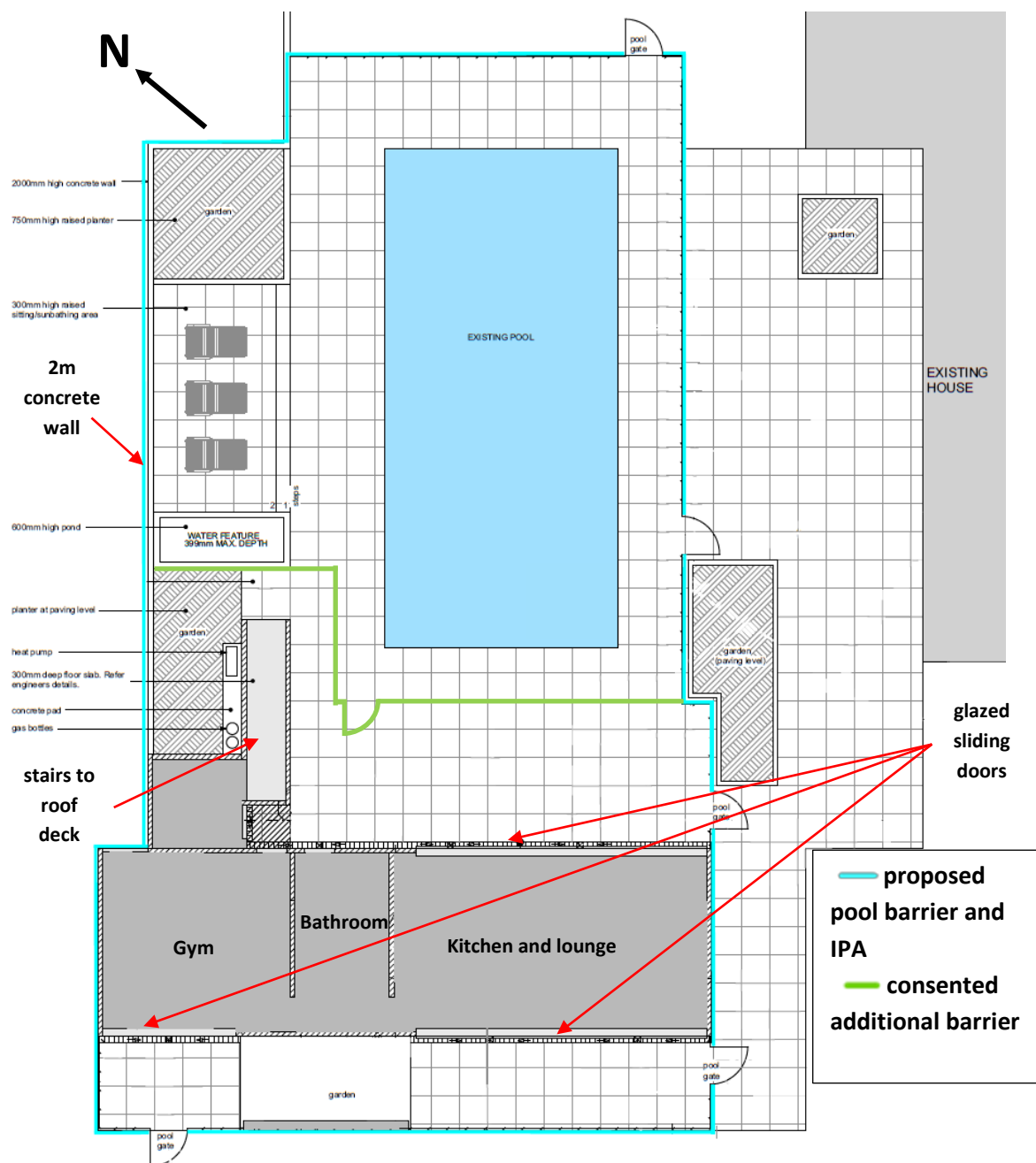
## 2. The building work and background

- 2.1. The property is located on a back section, off Marshland Road. There is an existing two-storey house, sheds, and an existing pool.
- 2.2. In 2018, a building consent (BCN/2018/8874) was issued. The existing house on the property was demolished, and the existing pool was kept. Work was carried out to construct a new house.
- 2.3. In 2021, the owners applied for a building consent (BCN/2021/4702) for the construction of a pool house. A single storey building with a roof deck, constructed from a lightweight concrete façade system with aluminium joinery, was proposed to be constructed adjacent to the pool, to the south-west (refer to Figure 1).
- 2.4. The ground floor of the pool house to be 135m<sup>2</sup>, with a total footprint of 171m<sup>2</sup>. The proposed pool house includes a bathroom with shower, separate toilet, changing facilities, a gym, a kitchen and bar within an indoor lounging space, and a roof deck (refer to Figure 2).



**Figure 2: Southwestern cross-section of the proposed pool house (not to scale)**

- 2.5. Glazed sliding doors on the north-east side of the pool house, facing the pool, provide access to the paved area surrounding the pool from the kitchen and lounge (refer to Figures 2 and 3).
- 2.6. A glazed pool fence and gates are located to the south-west side of the pool house, with this area including a small garden and further paved area. Another glazed pool fence and gates are also located to the north-east, south-east and south-west sides of the pool, directly adjacent to the paved area (refer to Figure 3).
- 2.7. The north-west side of the pool barrier is formed by a 2m high concrete wall, which borders a raised planter box, a small, paved sunbathing area as well as a water feature. Stairs providing access to the roof deck run alongside a narrow area of garden at paving level which houses the gas bottles and heat pump exterior unit (refer to Figure 3).



**Figure 3: Proposed pool house and associated pool barriers**

- 2.8. In July 2021, the authority sent a request for information to the owners for the building consent application. With respect to the pool barrier and proposed 'immediate pool area', the authority stated that a pool fence must be provided between the pool house and the pool, noting this was because “the majority of the [pool house] does not contain a use directly related to the use of the pool”, including the access to the roof deck.
- 2.9. The authority received a response to this request on 31 August 2021, and on 1 September 2021, the authority sent a further request for information. The authority stated it considered that “the pool, pool house and associated areas, as shown, do

not comply with the requirements of [clause F9] of the Building Code ...". The authority stated that the pool house and adjacent areas will "allow for activities not generally associated with the use of the pool and the extensive area allows for a disassociation from the pool edge". The authority noted that it "would refuse the consent as not having met the compliance requirements under [clause F9]."

- 2.10. On 8 September 2021, the owners made changes to the design to incorporate a barrier between the pool and pool house. On 10 September 2021, the authority sent a further request for information requesting the layout of the fence be adjusted to ensure the stairs to the roof deck were not part of the immediate pool area.
- 2.11. On 15 September 2021, the authority issued the building consent containing the revised design with a barrier shown between the pool and pool house excluding the stairs to the roof deck (see figure 3)
- 2.12. The owners subsequently applied to the Ministry for a determination in relation to their initial proposed design (see Figure 3) which they considered to comply with the requirements of Clause F9 of the Building Act.

### 3. Submissions

#### The owners

- 3.1. The owners consider the authority should not have refused to issue the building consent without a barrier between the pool and pool house because:
  - 3.1.1. The pool house is of modest size and is solely for use with the pool, primarily all-weather training for triathlons. It only contains changing facilities and a bathroom for the use of pool users, a kitchen and lounge space for entertaining while the pool is in use, and a gym for use with the pool.
  - 3.1.2. The facilities included in the pool house must be assessed in the context of the property as a whole. The property is large, with a sizable main dwelling that provides multiple and varied entertainment areas. This means that the pool house is solely for use with the pool.
  - 3.1.3. The pool house is not extensive when compared to the immediate pool area considered in Determination 2010/104<sup>2</sup>, which comprised a 112m<sup>2</sup> pool building with changing rooms, bathrooms, a gym, a pool room, a small bar, and a 195m<sup>2</sup> patio with an outside spa pool, a fireplace, and storage sheds.
  - 3.1.4. The pool has an automatic cover, which seals all the way around and is able to be walked on. It is always kept on when the pool is not in use.

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<sup>2</sup> Determination 2010/104: Safety barriers to a swimming pool and spa pool, at [6.3.2] (1 November 2010).

- 3.1.5. The pool barrier extends all the way around the pool house and pool, so no children can access the pool house unless accompanied by an adult.

## **The authority**

- 3.2. The authority considers that the pool house should not be part of the immediate pool area because:
  - 3.2.1. It has assessed the proposed design as a “holistic exercise” and considers that the pool house and associated areas do not comply with clause F9 because it allows for activities not generally associated with the use of the pool.
  - 3.2.2. It considers there is not a sufficiently close nexus between the spaces in the pool house and the pool for a separate barrier to not be included.
  - 3.2.3. Parts of the building are discrete from the pool, and do not allow the pool to be viewed. This includes the gym, roof deck and tiled garden area.
  - 3.2.4. Roof deck access should not be within the pool area as the immediate pool area cannot be used as thoroughfare.
  - 3.2.5. The assessment is not only based on the intentions of the current owners but must consider the life of the building and future owners and users.

## **The draft determination**

- 3.2.6. On 7 July 2023, a draft of this determination was issued to the parties for comment.
- 3.2.7. The authority accepted the draft determination on 27 July 2023 without further comment.
- 3.2.8. The owners accepted the draft determination on 28 July 2023.

## **4. Discussion**

### **Legislation**

- 4.1. Section 17 of the Act provides “that all building work must comply with the Building Code to the extent required by this Act...”.
- 4.2. Section 49 of the Act states the authority “must grant a building consent if satisfied on reasonable grounds that the provisions of the Building Code would be met if the

building work were properly completed in accordance with the plans and specifications accompanying the application for building consent.”

4.3. Clause F9 of the Building Code states:

F9.3.1 *Residential pools* must have or be provided with physical barriers that restrict access to the *pool* or the *immediate pool area* by unsupervised young children (i.e. under 5 years of age).

F9.3.2 Barriers must ... surround the *pool* (and may enclose the whole or part of the *immediate pool area*); ...

4.4. To establish compliance with clause F9, a barrier which encloses the pool or all or parts of the immediate pool area is required.

4.5. Given that this dispute centres on the immediate pool area, I have not considered any other aspects of the compliance of the pool barrier itself, nor the use of the automatic pool cover.

## Interpretation of immediate pool area

### Definition

4.6. To establish compliance with the Building Act, all residential swimming pools require a barrier that encloses the pool or ‘immediate pool area’.

4.7. Although the Building Code refers to ‘the immediate pool area’, it does not define this term. However, the ‘immediate pool area’ was defined in section 2 of the since repealed<sup>3</sup> Fencing of Swimming Pools Act 1987 (‘FOSPA’) is as follows:

... 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 out in conjunction with the use of the pool.

Section 7 of the Act defines ‘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.

While there are slight differences in the wording of the two definitions, I do not consider those differences to be material.

4.8. What constitutes the immediate pool area, and what may be included within such an area, was previously considered by the High Court in the decision *Waitakere City Council v Hickman* (“*Hickman*”)<sup>4</sup>. This case considered the interpretation and

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<sup>3</sup> Repealed on 1 January 2017.

<sup>4</sup> *Waitakere City Council v Hickman* HC AK CIV 2003-404-7266 [1 October 2004].

application of ‘immediate pool area’ in relation to FOSPA and saw the formation of a two-part test.

- 4.9. I consider the two-part test as formulated in the *Hickman* decision to be the correct way to determine whether an area is an immediate pool area.

#### **Activities carried out in conjunction with the pool**

- 4.10. According to *Hickman*, whether an area qualifies as an immediate pool area is determined by:

... the extent to which that area is actually used for activities or purposes properly regarded as taking place in conjunction with the use of the pool for its usual purposes of swimming, wading, paddling or bathing.<sup>5</sup>

- 4.11. The *Hickman* decision goes on to say, “activities which are carried on independently of the use of the pool or which only have a remote or indirect association with the use of the pool are to be excluded from the immediate pool area.”<sup>6</sup> Therefore, to find that an area comprises an immediate pool area, there must be a “sufficiently close nexus between the activity or purpose and the use of the pool.”<sup>7</sup> In essence, the question of whether an activity or association is sufficiently connected with the use of the pool is “a matter of degree.”<sup>8</sup>

- 4.12. *Hickman* gives the following examples of activities that would not usually be regarded as being carried out in conjunction with the pool: clothes lines, vegetable gardens, vehicle or pedestrian access ways, and planting for landscaping purposes.<sup>9</sup>

- 4.13. *Hickman* also gives the following examples of activities that would ordinarily qualify as being carried out in conjunction with the use of a pool: the use of pool furniture, changing sheds, pumps or pool maintenance equipment, sunbathing areas and diving boards or other pool equipment.<sup>10</sup>

#### **Immediacy - sufficient proximity to the pool**

- 4.14. While *Hickman* says an immediate pool area is determined “in the first place by its use”, the Court goes on to say that it is not governed solely by that factor; it is limited to an area that can properly be considered *immediate*. As stated in *Hickman*<sup>11</sup>:

Some weight must be given to Parliament’s use of the expression ‘immediate’. It must be assumed that the legislature intended that the immediate pool area to be

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<sup>5</sup> *Hickman*, at [35].

<sup>6</sup> *Hickman*, at [29](f).

<sup>7</sup> *Hickman*, at [29](e).

<sup>8</sup> *Hickman*, at [29](f).

<sup>9</sup> I note that this list of activities is not exhaustive; other activities may also be excluded.

<sup>10</sup> *Hickman*, at [29](g).

<sup>11</sup> *Hickman*, at [34].



fenced would be **relatively confined** and that, for example, a fence around the perimeter of the property would not comply with the Act. [my emphasis]

- 4.15. *Hickman* goes on to say that the area “must be sufficiently confined so that it may properly be described as being in the ‘immediate’ area of the pool.”<sup>12</sup>
- 4.16. The actual size of an immediate pool area depends, according to *Hickman*, on the circumstances of each case. However, the further away an activity takes place from the edge of the pool, the less likely it can properly be within the immediate pool area.<sup>13</sup> This is because it becomes less likely for the pool owners to be able to demonstrate that the activity:
- can properly be said to be carried out in relation to or involving the pool; and
  - is in sufficient proximity to the pool.
- 4.17. In summary, while the immediate pool area is determined by identifying the area surrounding the pool that is used for pool-related activities<sup>14</sup>, that area is “subject to the test of immediacy”<sup>15</sup> and must not extend any further than can properly be considered as being *immediate* to the pool.

### **Application of the *Hickman* test**

- 4.18. To decide whether the pool house can be considered to be part of the ‘immediate pool area’, I must consider whether the activities are sufficiently related to the use of the pool, and whether those activities are taking place in sufficient proximity to the pool.

#### **Activities undertaken in the pool house**

- 4.19. The owners have stated that the pool house is of modest size and solely for use with the pool, and only contains changing facilities and bathroom for use of pool users. The kitchen and lounge space are for entertaining to occur while the pool is in use, and the gym is for use with the pool.
- 4.20. The owners have referred to Determination 2010/104<sup>16</sup>, noting the pool house and area is not extensive when compared to the pool area considered in that determination, which comprised a 112m<sup>2</sup> pool building with changing rooms, bathrooms, a gym, pool room, a small bar, a 195m<sup>2</sup> patio with an outside spa pool, fireplace, and storage sheds.

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<sup>12</sup> *Hickman*, at [54].

<sup>13</sup> *Hickman*, at [34].

<sup>14</sup> I use the expression “pool related activities” to mean activities carried out in relation to or involving the pool.

<sup>15</sup> *Hickman*, at [29](b).

<sup>16</sup> Determination 2010/104: Safety barriers to a swimming pool and spa pool, at [6.3.2] (1 November 2010).

- 4.21. Determination 2010/104 considered the size of the spaces included within the proposed immediate pool area with reference to Determination 2008/123<sup>17</sup>, where it was accepted that activities associated with an outbuilding<sup>18</sup> containing a gym, sauna and steam room could take place in the immediate pool area. *Hickman* suggests that activities such as entertaining and barbequing can be carried out within an immediate pool area. On that basis, I accept that some of the activities relating to the use of the pool house are types of activities that can be carried out within an immediate pool area in some instances.
- 4.22. However, the pool house is substantially larger than that considered in Determination 2008/123, as the total size of the pool house is 171m<sup>2</sup>, including the roof deck. With a ground floor of 135m<sup>2</sup>, which includes a 57m<sup>2</sup> kitchen and lounge area and a 34m<sup>2</sup> gym. The significance of this, as set out in *Hickman* and discussed in Determination 2010/104, is that the greater the area of land that is encompassed within the immediate pool area, the more likely it becomes that activities in that area will not be ‘carried on in conjunction with the use of the pool’ and so should not be included within the area.<sup>19</sup>
- 4.23. In contrast to the current situation, the individual rooms forming the outbuilding proposed to be included in the immediate pool area in Determination 2008/123 were relatively small (2m<sup>2</sup>), and therefore precluded activities of a different nature from occurring. Consequently, the rooms were unlikely to attract unsupervised, young children. The Determination also considered that the use of the outbuilding was unlikely to change from the proposed uses of the owner given the small size of the individual rooms and low likelihood of large numbers of people using them.
- 4.24. Given the nature of the various spaces within the pool house, such as the gym, bathroom, changing rooms, kitchen and lounge, as well as the large size of the pool house, I consider that more often than not, activities in the pool house could be carried out independently and be entirely disassociated with the use of the pool. I also consider that activities undertaken in the pool house, such as eating and relaxing in the lounge area, could reasonably involve children under the age of five.
- 4.25. I note that the owners have submitted that the pool house must be assessed in the context of the overall property, which has multiple large entertainment areas not in the pool house that can be used for entertaining.
- 4.26. Regardless, it seems likely that the pool house could be used as an all-weather facility for exercise and recreation, and the building’s size makes it possible that children under the age of five could accompany people exercising or using the

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<sup>17</sup> Determination 2008/123: Dispute about the code compliance of an outbuilding to be erected in a pool area, at [6.8] (24 December 2008).

<sup>18</sup> See clause A1, 7.0.1 of the Building Code. A classified use of ‘outbuilding’ applies to a building or use that are accessory to the principal use of associated buildings, but are not intended for human habitation.

<sup>19</sup> *Hickman*, at [29](g).

facilities in the pool house and may not be adequately protected or supervised around the pool while adults are otherwise occupied.

- 4.27. Likewise, I consider the roof deck, stairs, small garden and further paved area on the south-west side of the pool house to not have uses or likely activities that are sufficiently connected with the use of the pool. I also note the area containing the heat pump unit and gas bottles would have poor visibility to the pool due to the side elevation of the stairs.
- 4.28. While the owners have stated that the pool house is solely for use with the pool, and primarily for all-weather triathlon training, the compliance of the building cannot rely on the behaviour and management practices of the people using the pool. Management practices are not enforceable when it comes to compliance, as already established in previous determinations.<sup>20</sup>

#### **Proximity of the pool house to the pool**

- 4.29. While I have already concluded that some of the activities likely to be undertaken in the pool house are not sufficiently related to the pool to be included in the immediate pool area, I will further go on to consider the issue of proximity.
- 4.30. In Determination 2008/123 (refer to paragraphs 4.21 to 4.23), the outbuilding was approximately 1.2 metres from the pool edge, with the outbuilding comprising 2m<sup>2</sup> individual rooms. It was found to be in close proximity to the pool and therefore met the threshold for immediacy. In contrast, the north-east side of the pool house, closest to the pool, is approximately 6m from the pool, and the small garden and further paved area on the south-west side of the pool house is approximately 14m from the pool. These are not insignificant distances. Although some uses of the areas within the pool house are comparable to the outbuilding in Determination 2008/123, both the proximity to the pool and the overall size of the pool house building are significantly greater. I am therefore of the view that this proposed overall immediate pool area, given the inclusion of the pool house, is too large to be considered proximate to the pool.
- 4.31. I also note that the size of the various spaces incorporated in the pool house are not insignificant, given the kitchen and lounge area is 57m<sup>2</sup> and the gym is 34m<sup>2</sup>. The ample size and the configuration of these spaces mean that a variety of activities could take place. From certain locations, for example, in the gym, bathroom and changing rooms, the pool is not directly in sight. While I accept that such spaces may still fall within the scope of activities that qualify as being carried on in conjunction with the use of a pool, the size of the building and the resulting layout disassociate the pool from the potential uses of the spaces within the pool house.

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<sup>20</sup> For example, Determination 2006/22: Swimming pool fences, at [5.7] (22 March 2006).

- 4.32. I also note that the small garden and further paved area on the south-west side of the pool house is separated from the pool by the pool house itself. For this reason, it is not 'immediate' to the pool, and cannot be considered sufficiently proximate.
- 4.33. Furthermore, the roof deck, which is accessed up a set of stairs located beside the paved area surrounding the pool, is on a different level to the pool and it would be difficult to see how it could be considered proximate to the pool.

## **5. Conclusion**

- 5.1. For the reasons set out above, I conclude that the pool house cannot properly be considered to be part of the 'immediate pool area' and a barrier is required to be provided between the pool and pool house, which has been provided in the consented design.
- 5.2. The owners have suggested making additional changes to comply with the requirements of clause F9, including the addition of self-closing and latching doors to the gym and changes to the location of the south-west barriers. That is outside the scope of this determination, and I leave it to the parties to discuss possible solutions for compliance while taking into consideration the various factors noted above.

## **6. Decision**

- 6.1. In accordance with section 188 of the Building Act 2004, I determine that the proposed pool barrier did not comply with Building Code Clause F9 as the pool house and other spaces contained within the proposed pool barrier cannot be considered to be part of the immediate pool area. Accordingly, I confirm the authority's proposed decision to refuse to grant the building consent.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 25 August 2023.

**Charlotte Gair**

**Manager Advisory**

## **APPENDIX A- Building Act 2004**

### **17 All Building work must comply with building code**

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

### **49 Grant of building consent**

(1) A building consent authority must grant a building consent if it is satisfied on reasonable grounds that the provisions of the building code would be met if the building work were properly completed in accordance with the plans and specifications that accompanied the application.

(2) ...

## APPENDIX B - Building Regulations 1992 – Schedule 1

### Clause F9—Means of restricting access to residential pools

#### Objective

F9.1 The objective of this provision is to prevent injury or death to young children involving *residential pools*.

#### Functional requirement

F9.2 *Residential pools* with a maximum depth of water of 400 mm or more that are filled or partly filled with water must have means of restricting access that prevents unsupervised access by a child under 5 years of age.

#### Performance

F9.3.1 *Residential pools* must have or be provided with physical barriers that restrict access to the pool or the *immediate pool area* by unsupervised young children (i.e. under 5 years of age).

F9.3.2 Barriers must either—

(a) surround the *pool* (and may enclose the whole or part of the *immediate pool area*); or

(b) in the case of a *small heated pool*, cover the *pool* itself.

...