



**AGENDA FOR A MEETING OF THE SWIMMING POOL EXEMPTION COMMITTEE  
TO BE HELD IN THE CIVIC CENTRE, 6 WAIPAREIRA AVENUE, LINCOLN,  
WAITAKERE CITY, ON TUESDAY, 2 MAY 2006  
COMMENCING AT 9.30 AM**

---

**TABLE OF CONTENTS**

<b><u>ITEM</u></b>		<b><u>PAGE NO.</u></b>
1	<b>APOLOGIES</b>	1
2	<b>URGENT BUSINESS</b>	1
3	<b>CONFIRMATION OF MINUTES</b>	1
4	<b>APPLICATIONS FOR SPECIAL EXEMPTIONS - FENCING OF SWIMMING POOLS ACT 1987</b>	2
5	<b>LEGAL UPDATE - APRIL 2006</b>	8

**AGENDA FOR A MEETING OF THE SWIMMING POOL EXEMPTION COMMITTEE  
TO BE HELD IN THE CIVIC CENTRE, 6 WAIPAREIRA AVENUE, LINCOLN,  
WAITAKERE CITY, ON TUESDAY, 2 MAY 2006  
COMMENCING AT 9.30 AM**

---

**1 APOLOGIES**



**2 URGENT BUSINESS**

Section 46A(7) of the Local Government Official Information and Meetings Act 1987 provides that where an item of business is not on the agenda, it may only be dealt with at the meeting if:

- (i) the Committee by resolution so decides; and
- (ii) the Chairperson has explained at the beginning of the meeting (when open to the public) that the item will be raised for discussion and decision, why the item is not on the agenda, and why it cannot be delayed until a subsequent meeting.

The Committee may make a decision on a matter determined to be urgent.

**NOTE:** Urgent Business need not be dealt with now and may be delayed until later in the meeting.



**3 CONFIRMATION OF MINUTES**

Meeting Minutes - Friday, 31 March 2006

**RECOMMENDATION**

That the minutes of the Meeting of the Swimming Pool Exemption Committee held on Friday, 31 March 2006, as circulated, be taken as read and now be confirmed.



#### 4 APPLICATIONS FOR SPECIAL EXEMPTIONS - FENCING OF SWIMMING POOLS ACT 1987

##### PURPOSE OF THE REPORT

The purpose of this report is to present and seek decisions on nine applications for exemptions from some of the requirements of the Fencing of Swimming Pools Act 1987 (the Act).

##### BACKGROUND

A1 Under Section 6 of the Act, copy attached at page **A1**, a Council may only grant exemption if, after having regard to the characteristics of the property and the pool and any conditions that may be imposed, it is satisfied that "*such an exemption would not significantly increase danger to young children*". The sort of issues that will usually arise for consideration under a s6 exemption include matters such as the location of fences in relation to the boundaries of the "*immediate pool area*", the construction of the pool fence and the operation of gates providing access to the fenced area.

A2-A4 The details for a complying fence are set out in the Schedule to the Act, a copy of which is attached at pages **A2 to A4**. Of particular note are the provisions of Clauses 8 to 10, relating to gates and doors, and Clause 11. Where a building is part of the pool fence and a door from that building opens into the pool area the Council may grant an exemption from compliance with Clauses 8 to 10 if it is "*satisfied that such compliance is impossible, unreasonable, or in breach of any other Act, regulation, or bylaw, and the door is fitted with a locking device that, when properly operated, prevents the door from being readily opened by children under the age of 6 years*".

A pool fence which complies with the Act, with or without an exemption, also complies with the requirements of the building code. A fence which complies with the building code, with or without an exemption granted under the Act, meets the requirements of the Act. Under the building code "*sliding and sliding-folding doors that give access to the immediate pool (area) from a building that forms part of the*" pool fence does not need to be self closing and self latching. To comply with the Act however such doors need to have a latch mounted at least 1.5 metres above the ground. The requirements for sliding and sliding-folding doors under the code will be relevant to the exercise of the Council's discretion in relation to an application for an exemption under Clause 11 of the Schedule in respect of doors opening from a building into a pool area.

Apart from these matters the Act provides no further guidance for the basis of the exercise of the Council's discretion. The purpose of the Act is stated to be "*to promote the safety of young children by requiring the fencing of certain swimming pools*" and that is clearly a relevant issue for Councillors to bear in mind in relation to any exemption application.

When granting a special exemption the committee may impose such other conditions relating to the property or the pool as are reasonable in the circumstances (Section 6(2)). Issues to be considered include:

- Will the exemption be personal to the applicant so that on a sale of the property a new owner will need to apply for a new exemption? This might be appropriate where the personal circumstances of the applicant have had a bearing on the exercise of discretion;
- Will the exemption be granted for a fixed term and irrespective of changes of ownership so that the exemption runs with the property?
- Will the exemption be granted for an indefinite term, irrespective of changes of ownership so that the exemption runs with the property?

- Are there any other conditions which should be imposed, such as the replacement of pool covers after use (particularly in relation to spa pools) or a requirement for more frequent inspection of the pool (currently pools in the City are re inspected on a 3 yearly cycle).

Any exemption granted or condition imposed may be amended or revoked by the Council, by resolution. The rules of natural justice would, however, dictate that this action should not be taken without prior notice to the pool owner and allowing the pool owner an opportunity to be heard.

Finally it is noted that there is a view in some quarters that an exemption can only be granted on the application of the pool owner. While there are doubts about the validity of that view, circumstances will arise where the Swimming Pool Exemption Committee may wish to grant an exemption, but there are matters in relation to the extant pool fence where a further exemption may need to be granted to enable the exempted arrangements to fully comply with the Act. The most common examples will arise where the fence, following exemption, will include a door which opens into the pool area from a building or there is a gate in the extended fence which does not comply with the Act. In such cases it is considered appropriate for the Swimming Pool Exemption Committee to accept an oral application for any further exemptions that may be necessary. The Committee Secretary will record the application made. If the Swimming Pool Exemption Committee does not consider it appropriate to grant an exemption for such matters, but it would be happy if some work is done, then it is recommended that the appropriate course of action is to grant the exemption sought conditional upon specified work being completed within a reasonable period.

## STRATEGIC CONTEXT

Council is committed to ensuring that Waitakere City is a safe place to live and play in. Swimming pool fencing issues have a strong relationship with Council's strategic priorities of first call for children and safe city.

## APPLICATIONS

### 1. D Stewart, 26 Valley Road, French Bay, Titirangi

A5-A7

The application and applicant's information is attached at pages **A5** to **A6**. Additional information attached at page **A7**. The application arises from officers requests to:

- Provide a fence to the immediate spa pool area so as to isolate the spa from activities not associated with the spa and to stop direct access from the house. Spa as shown at page **A7**.

The applicants have requested that the Swimming Pool Exemption Committee consider:

- Granting an exemption for the requirement to fence the immediate spa pool area because the spa pool has a lockable cover which is very heavy and can not be lifted by a child. The pool is 90cm above ground. There are dead bolts on all ranch slider doors leading to the outside area. The spa is surrounded by a rock wall, fencing and deck area. The house and deck is located in dense bush. The applicants state that they contacted the council for details prior to purchasing the spa and were instructed that they should buy the pool first as the decision to fence lockable spa pools above ground was still under review and was not final.

If the Swimming Pool Exemption Committee is inclined to grant the exemption sought, there are no consequential issues that arise.

## 2. D and L Brown, 367B Titirangi Road, Titirangi

A8-A11

The application and applicant's information is attached at pages **A8** to **A10**. Additional information is attached at page **A11**. The application arises from officers requests to:

A11

- Provide a fence to the immediate swimming and spa pool area so as to prevent direct access from the landscaping and gardens. Indicative position of fence shown at page **A11**;
- Ensure that all swinging doors which provide access to the immediate swimming and spa pool area are made self closing and self latching from a stationary measured distance of 150mm and are swinging away from the immediate swimming and spa pool area. A latching device must also be fitted to each door at a minimum height of 1.5m. NOTE: Sets of doors must operate (latch and close) independently of each other.

The applicants have requested that the Swimming Pool Exemption Committee consider granting an exemption from the standard fencing controls as they believe that the fencing complies with the legislation and note that this is a bush site.

If the Swimming Pool Exemption Committee is inclined to grant the exemption from fencing the immediate swimming pool area the consequential issues that arise include.

- The double gates at the rear of the property are not self closing and self locking;
- The bracing on the gates at the rear of the property is climbable;
- The gate at the side of the house is not self closing or self latching;
- The area enclosed in the existing pool fencing is large and contains vegetation/landscaping outside of the allowable amount discussed in Randerson judgement;
- The perimeter fencing mesh is greater than 50mm;
- The immediate swimming pool area is a thoroughfare through to the lawn area at the back of the property.

The above may not be an exhaustive list and the committee would need to consider whether the above (and possible other matters) should be exempted or should be made to comply.

## 3. P W. and J McLachlan, 6 Tamariki Avenue, Kelston

A12-A14

The application and applicant's information is attached at pages **A12** to **A13**. Additional information is attached at page **A14**. The application arises from officers requests to:

- Ensure that all swinging doors which provide access to the immediate swimming and spa pool area are made self closing and self latching from a stationary measured distance of 150mm and are swinging away from the immediate swimming and spa pool area. A latching device must also be fitted to each door at a minimum height of 1.5m. NOTE: Sets of doors must operate (latch and close) independently of each other.

The applicants have requested that the Swimming Pool Exemption Committee consider:

- Granting an exemption for the direction the doors swing under Clause 11 of the Schedule to the Act as the doors are constructed in such a manner to open outwards. The French doors can not be modified to be self closing and self latching. There are lock bolts top and bottom on both doors. The bolts are at a height of 2m from floor. The doors are shown on page **A14**.

If the Swimming Pool Exemption Committee is inclined to grant the exemption sought, there are no consequential issues that arise.

#### 4. J Dart, 50 Te Atatu Rd, Te Atatu

A15-A16

The application and applicant's information is attached at pages **A15** to **A16**. Additional information is attached at page **A17**. The application arises from officers requests to:

- Provide a fence to the immediate spa pool area so as to prevent direct access from other activities not associated with the spa pool and direct access from the house and the lawn.

The applicants have requested that the Swimming Pool Exemption Committee consider:

- Granting an exemption for the requirement to fence the immediate spa pool area, as the swimming pool is fully fenced and meets the regulations and there are deadlocks on the ranch sliders to the back garden. The spa pool has a hinged lid which is locked at all times and the pool is 900mm above ground. The spa pool is situated in a position to allow access and use for the owner's son who has cerebral palsy and is in a wheel chair. If the spa pool area was fenced he would be unable to access this area to make use of the spa pool which is a part of his therapy. The spa pool is unable to be repositioned as it is under an enclosed gazebo and is positioned between the posts so it can not be moved. The back garden is also fully fenced.

If the Swimming Pool Exemption Committee is inclined to grant the exemption sought, there are no consequential issues that arise.

#### 5. Clare Properties Limited, 22 Matuhi Rise, Henderson

A18-A20

The application and applicant's information is attached at pages **A18** to **A19**. Additional information is attached at page **A20**. The application arises from officers requests to:

A20

- Ensure that all swinging doors which provide access to the immediate swimming and spa pool area are made self closing and self latching from a stationary measured distance of 150mm and are swinging away from the immediate swimming and spa pool area. A latching device must be fitted to each door at a minimum height of 1.5m. NOTE: Sets of doors must operate (latch and close) independently of each other. Doors as shown at page **A20**.

The applicants have requested that the Swimming Pool Exemption Committee consider:

- Granting an exemption for the direction the doors swing under Clause 11 of the Schedule to the Act as the doors are constructed in such a manner to open outwards. The French doors can not be altered to swing inwards. The doors have had dead bolts fitted at the top of all doors which open into the immediate swimming pool area. Stays have been fitted to the windows beside the Spa pool;
- Waiving the application fee.

If the Swimming Pool Exemption Committee is inclined to grant the exemption sought, there are no consequential issues that arise.

**6. C J Webb and K S Bingham, 132 West Harbour Drive, West Harbour**

A21-A23

The application and applicant's information is attached at pages **A21** to **A22**. Additional information is attached at page **A23**. The application arises from officers requests to:

- Ensure that all swinging doors which provide access to the immediate swimming and spa pool area are made self closing and self latching from a stationary measured distance of 150mm and are swinging away from the immediate swimming and spa pool area. A latching device must also be fitted to each door at a minimum height of 1.5m. NOTE: Sets of doors must operate (latch and close) independently of each other.

The applicants have requested that the Committee consider:

- Granting an exemption for the direction the doors swing under Clause 11 of the Schedule to the Act as the doors are constructed in such a manner to open outwards. The French doors can not be altered to swing inwards. It would be very costly to have the doors removed and new doors refitted to swing the other way. The doors are dead bolted at the top.

If the Swimming Pool Exemption Committee is inclined to grant the exemption for the sought, there are no consequential issues that arise.

**7. C. Graham, 17 Marguerita Place, West Harbour**

A24

The application and applicant's information is attached at page **A24**. The application arises from officers requests to:

- Ensure the swimming pool gates are self closing and self latching from a stationary measured distance of 150mm;
- Ensure that all swinging doors which provide access to the immediate swimming and spa pool area are made self closing and self latching from a stationary measured distance of 150mm and are swinging away from the immediate swimming and spa pool area. A latching device must also be fitted to each door at a minimum height of 1.5m. NOTE: Sets of doors must operate (latch and close) independently of each other;
- Provide bolts to all sliding or sliding-folding doors which provide access to the immediate swimming pool area at a minimum height of 1.5m;
- Provide all lower windows (below 1.2m) which open into the immediate swimming pool area with permanent stays which restrict the window opening to a maximum of 100mm.

The applicants have requested that the Swimming Pool Exemption Committee consider:

- Granting an exemption for the doors under Clause 11 of the Schedule to the Act as the doors are constructed in such a manner to open outwards. The doors are kept locked at the top well out of reach of children.

If the Swimming Pool Exemption Committee is inclined to grant the exemption sought, there are no consequential issues that arise.

## 8. P Midgley and Sons Limited, 153 Clark Road, Hobsonville

A25-A30 The application and applicant's information is attached at pages **A25** to **A30**. The application arises from officers requests to:

- Ensure that all swinging doors that provide access to the immediate swimming pool area are made self closing and self latching from a stationary measured distance of 150mm, and are swinging away from the immediate swimming pool area. A latching device must also be fitted to each door at a minimum height of 1.5m. Note: Sets of doors must operate (latch and close) independently of each other;
- Provide bolts to all sliding or sliding-folding doors that provide access to the immediate swimming pool area at a minimum height of 1.5m;
- Provide all lower windows (below 1.2m) which open into the immediate swimming pool area with permanent stays that restrict the window opening to a maximum of 100mm.

The applicants have requested that the Swimming Pool Exemption Committee consider:

- A27-A29
- Granting an exemption for the outward swinging doors and under Clause 11 of the Schedule to the Act and for the bi-fold opening windows. The doors and bi-fold windows are shown at pages **A27** to **A29**.

If the Swimming Pool Exemption Committee is inclined to grant the exemption sought, there are no consequential issues that arise.

## 9. M G Thompson, 52 Swanson Road, Henderson

A31 A verbal application and application fee has been received from the applicant. Additional information is attached at page **A31**. The application arises from officers' requests to:

- Ensure that all swinging doors which provide access to the immediate swimming and spa pool area are made self closing and self latching from a stationary measured distance of 150mm, and are swinging away from the immediate swimming pool and spa pool area. A latching device must also be fitted to each door at a minimum height of 1.5m. NOTE: Sets of doors must operate (latch and close) independently of each other.

The applicants have requested that the Swimming Pool Exemption Committee consider:

- Granting an exemption for the doors, that swing into the pool and spa area, under Clause 11 of the Schedule to the Act as the doors are constructed in such a manner to open outwards.

If the Swimming Pool Exemption Committee is inclined to grant the exemption sought, there are no consequential issues that arise.

## CONCLUSION

Each of the applicants is seeking exemption from the Act for matters where Council staff considers that remedial action is necessary to achieve compliance with the Act. If an exemption is granted those matters will be deemed to comply with the Act, therefore no remedial action will be required (other than for any action that may be required by a condition attaching to the granting of the exemption).

## **RECOMMENDATIONS**

1. That the Applications for Special Exemptions - Fencing of Swimming Pools Act 1987 report be received.
2. That the Swimming Pool Exemption Committee consider each of the applications and either decline or approve (subject to conditions) the exemptions sought.

Report prepared by: Neville Colling, Team Manager Operational Compliance.



## **5 LEGAL UPDATE - APRIL 2006**

### **PURPOSE OF THE REPORT**

The purpose of this report is to make a brief comment on the recent decision of Judge Taumaunu in the Osborne prosecution case and to provide the Swimming Pool Exemption Committee with a briefing on issues relating to lockable spa pool covers

### **THE OSBORNE DECISION**

A32-A45

A copy of the Judge's decision is attached to this report at pages A32 to A45. The decision is largely unremarkable except for the observation, in relation to a pedestrian access way along the side of the pool, that while it was open to the defendants to seek an exemption the judge thought that it was "highly unlikely" that an exemption would be granted (see paragraph 53). While the judge's reasons for that remark are not articulated in the decision it seems reasonable to assume that he reached this conclusion because of the observation of Justice Randerson in the High Court declaration decision that a pedestrian access way will not usually be included within "the immediate pool area". Subsequent to the decision Mr and Mrs Osborne have proceeded to erect a complying fence between the pool and the pedestrian access way.

The Swimming Pool Exemption Committee has granted at least one exemption for an extended immediate pool area which included a pedestrian access way. The exemption was granted without any conditions. It is accepted that the final decision in relation to such matters is entirely within the discretion of the exemption committee, having regard to the statutory test in Section 6 of the Fencing of Swimming Pools Act ("the Act ") and the committee members' own judgment of the circumstances after an inspection of the site. However officers involved with pool inspections would welcome any general guidance that the committee may be able to give them as to the manner or circumstances within which that discretion may be exercised in the future so that they are better able to advise pool owners of the likely outcome for exemption application in respect of an area which includes a pedestrian access way.

### **LOCKABLE SPA POOL COVERS**

For the first time since this committee was constituted in its current form, it now has before it applications for exemption from the requirements of the Act for spa pools with lockable covers.

A46-A61

Attached to this report at pages A46 to A61 is a copy of Determination 2002/2010 of the former Building Industry Authority in relation to these lockable covers. This decision has achieved considerable notoriety and the conclusions reached have been the subject of some controversy. The issues relating to these covers give spa pool owners and Council officers considerable practical difficulty on a day-to-day basis. Spa pool covers were not dealt with in the High Court declaration proceedings and this is one of the areas of the law where legislative intervention to provide greater certainty, or simplicity of application, would be most welcome to all concerned.

The Determination finds, at paragraph 9.1, that lockable covers do not comply with the Clause F4 of the building code. It also follows from this finding that a spa pool with a lockable cover, without more, does not comply with the requirements of the Act since the cover is neither a "fence" or "gate" or "door" for the purposes of the Act. There is nothing remarkable in that finding. The Authority might also have found that a cover did not isolate the "immediate pool area" from access by children under the age of six years; rather it was a device which was intended to prevent children under the age of six years within the immediate pool area from gaining access to the water in the pool. Either way the outcome is the same; the purpose of the Act is to ensure that young children are not endangered by access to water away from within the immediate pool area.

Significantly, however, at paragraph 8.2.1 of the determination, the Authority recorded that it did *"not have the jurisdiction to grant an exemption under Section 6 of the (Act), and it is not for the Authority to advise territorial authorities as to the granting of such exemptions"*. This is important since, in some quarters, it has been said that the Determination is the last word on the matter. Clearly that is not the case.

It remains open for an exemption to be granted under Section 6 of the Act if the committee is satisfied that the statutory test for granting an exemption is met. In other words, if the Committee can be satisfied that "having regard to the particular characteristics of the property and the pool, and other relevant circumstances, and any conditions (imposed) under subsection (2) such an exemption would not significantly increase danger to young children".

You will note in the Determination a reference to the fact that some local authorities had purported to give a blanket exemption in relation to particular types of pool cover. The language of Section 6 is quite plain and uncomplicated. A blanket exemption is clearly not possible since regard must be had in each case to the "particular characteristics of the property and the pool, and any other relevant circumstances". Equally, for the same reasons, it is not possible for a local authority to impose a blanket prohibition and refuse to consider any applications for exemption from spa pool owners. Sadly, there is therefore no practical option but for each case to be considered on its own merits. It would however be helpful for Council officers to receive some general guidance from the Committee as to way in which, if at all, it might exercise its discretion in these matters.

In the meantime Council officers will continue to apply the provisions of the Act in the context of the Randerson decision and with due regard to the findings in the Determination i.e. they will inform spa pool owners that a spa pool is subject to the Act, the Act requires fencing of the "immediate pool area" and that it is open to a pool owner who does not wish to fence that area to apply for an exemption. This approach is consistent with the way that other local authorities in the Auckland area approach these matters. However, it would seem that some of the Councils may be less receptive than others to exemption applications.

If the Swimming Pool Exemption Committee is minded to grant an exemption to the use of a lockable spa pool cover in a particular case in the committee may need to consider whether or not it is appropriate to impose conditions in relation to that decision. Factors which might influence the exercise of discretion or the nature of the conditions to be imposed might include the following:

- Is the spa pool in ground or freestanding? The Committee might take the view for example that there is less risk with freestanding where the rim of the spa pool is at least 800 mm above the surrounding ground level or any other easy means of access to the spa pool;
- Is the weight or method of construction of the cover relevant? What is the ease of operation? What is the potential for the spa pool to be left uncovered and accessible to children under the age of six years?
- Is the spa pool located within a larger area which is otherwise fenced in a manner which would comply with the Act, or which would otherwise be eligible for an exemption in the case of an ordinary swimming pool?
- Should the exemption, if granted, be for a limited period or for an unlimited period? (Swimming pools and spa pools are inspected on a three yearly cycle in any event);
- Should the exemption, if granted, be personal to the applicants and expire on the sale of the property by the applicants, or upon any change in the personal circumstances of the applicants, so that it is not available to any subsequent purchaser of the property? This may be relevant in circumstances where a factor in the decision to grant the exemption is "any other relevant circumstance", rather than the particular characteristics of the property. An example might be a spa pool with a lockable cover on a property on which no children under the age of six years live or visit and the spa pool is otherwise located within an area which is capable of easy supervision and is fully fenced, albeit beyond the boundaries of the "immediate pool area". It will also be relevant where the pool is free-standing and is therefore a chattel which may not necessarily be included in any sale of the property.

In the course of inquiries made of other local authorities in relation to this issue it was discovered that Rodney District Council has in the (recent) past approved exemptions for lockable spa pool covers on the sort of conditions set out below. These conditions are put forward as examples for consideration by the Swimming Pool Exemption Committee, but without any endorsement as to the appropriateness of those conditions, as the sort of thing that might be considered by the Committee if it is minded to grant an exemption in a particular case.

The Rodney District Council conditions are generally as follows (some minor drafting adjustments have been made):

1. That the cover be lockable and locked whenever the spa pool is not intended for use, by a locking device which prevents the cover from being readily opened by children under the age of six years.
2. That when locked the cover is fitted so that if lifted it does not release the locking device or provide a clearance greater than 100mm.
3. That the cover be made of such material that: if walked or fallen upon it cannot collapse; is durable and erected so that it does not permit any person to climb or crawl under the cover when in the closed position; and that any dimension or opening in the material of the cover does not have a circumference exceeding 100mm.
4. That the cover be easily lowered or able to be replaced on the spa pool.
5. That the cover must have lockable latches which are locked at all times when the spa pool is not in actual use.
6. That appropriate signage be attached to the top of the cover (The Council apparently has standard wording to the effect that the cover must remain in position and locked at all times when not actual use to comply with the requirements of the Act).

## CONCLUSIONS

The issues raised in this report are not particularly straightforward and require some careful thought. In those circumstances committee members may prefer a discussion in a workshop context before reaching any firm conclusions.

## RECOMMENDATIONS

1. That the Legal Update - April 2006 report be received.
2. That a workshop be arranged for discussion of the matters raised in this report.

Report prepared by: Denis Sheard, Legal Services Manager.

