

Chairperson and Committee Members  
**REGULATORY MANAGEMENT COMMITTEE**

**4 AUGUST 2011**

Meeting Status: Public

Purpose of Report: For Information

**STORMWATER DETENTION PONDS AND THE FENCING OF  
SWIMMING POOLS ACT 1987**

**PURPOSE OF REPORT**

- 1 The purpose of this report is to advise of the implications of the Fencing of Swimming Pools Act 1987 (the Act) on stormwater detention ponds constructed during subdivision of land.

**SIGNIFICANCE OF DECISION**

- 2 The recommendations in this report do not trigger the Council's significance policy.

**BACKGROUND**

- 3 For at least 20 years the Council has been approving subdivisions throughout the district and allowing stormwater detention ponds to be created to deal with the subsoil conditions (high water table) that exist and site specific flooding issues. In creating these subdivisions, and the detention ponds, ownership of the ponds has generally fallen into the following three categories:
  - Incorporated into the residential lots (lots surrounding the pond all have boundaries which merge at the centre of the pond)
  - Separate lot created for the pond or the pond remains as the balance of the parent lot (individual lots share common boundary with the pond).
  - Ownership has been vested in Council (reserve land provides buffer between the pond and residential lots)
- 4 Other properties, predominantly in rural areas, may have created their own ponds either for drainage or amenity purposes.
- 5 Discussions last year with a local developer about a particular subdivision raised the issue of whether or not fencing was required to the rear of the lots at the junction of the pond and landscaped area. As a result, two of the recent dwellings in this subdivision have had, or are in the process of having, fences installed separating the house from the pond. Other dwellings are not yet sold.
- 6 To resolve the uncertainty of whether or not the ponds were captured by the Act legal opinions were obtained from Simpson Grierson and Chapman Tripp
- 7 The opinions reflect a 2004 coroner's decision regarding the drowning of a two year old child in an unfenced ornamental pond located 74 metres from a

residence. The coroner found the pond was covered by the Act. Both legal opinions quite clearly state that *“in our view a stormwater detention pond and other similar water bodies are covered by the definition of “pool” in the Act* On this advice, it is the opinion of Council officers that a pond, when used in association with a house, is required to be fenced to comply with the Act. A pond is likely to be considered to be *“associated”* with a house where it is owned wholly or partly by the owner of the house and where it is integrated into the landscaping of the property. Where the pond is located within a single lot it is unlikely that neighbouring lots would be considered as being associated with the pond.

- 8 Both legal opinions clarify that ponds in Council ownership are exempt from the Act primarily because they are not used “in association with a house”.
- 9 The Act’s main purpose is to promote the safety of young children and it does this by requiring pools to be fenced. Under the Act pools must be fenced unless an exemption applies. The most relevant exemption is section 5(c) of the Act. To fit within this exemption:
  - (i) the pool must not be used in association with a house or other similar structure, **and**
  - (ii) must not be *“intended for swimming, wading, paddling or bathing.”*
- 10 Both parts (i) and (ii) of the definition must be satisfied for the exemption to apply. In other words, if a pond is associated with a house then it must be fenced even if there is no intention to use it for wading, paddling etc.

## CONSIDERATIONS

### Issues

- 11 Under section 8 of the Act it is the pool owner’s responsibility to ensure the pool is fenced. Section 10 of the Act states that, *“every Territorial Authority is required to take all reasonable steps to ensure that the Act is complied with”*. The Council has fulfilled its obligation to ensure the Act is being complied with in the district and has applied the law to swimming pools and spas. However, the legal advice the Council now holds encompasses situations where the Council has not, until now, made property owners aware the Act might apply to ponds on their property.
- 12 Kapiti Coast District Council takes a more proactive approach than many other Territorial Authorities ensuring pools within the District comply with the Act. All known swimming pools and spas are inspected by the Council every three years to ensure continued compliance with requirements. Key Performance Indicators are in place to ensure this approach is maintained. As a result of this highly proactive approach applications for exemptions are regularly considered by the Regulatory Management Committee.
- 13 A desktop survey has been carried out to determine the scale of the Council’s responsibilities under section 10 of the Act to ensure compliance with the Act as it relates to stormwater detention ponds. The survey, a visual inspection of the

district using GIS, identified 122 urban properties which appear to fall into the categories identified in paragraphs 4 above.

- 14 Although there are rural properties with ponds these have not been considered. Rural ponds are considered to pose a very low risk to the safety of young children (the purpose of the Act is to promote the safety of young children) and are also likely to fall outside the requirements of the Act. Rural ponds are unlikely to be used in association with a house and certainly are not intended for swimming, wading or paddling. Rural sites, by their nature, are significantly larger than urban sites which are more likely to have restricted outdoor space leading to a higher probability of the pond being “used in association with a house”.
- 15 There are a number of property owners who have already taken the initiative and fenced their pond. Whether or not they comply with the Act’s fencing schedule can only be determined once an inspection has been carried out.

## Options

- 16 The following options have been identified by staff, only one of which is considered to meet the Council’s obligations under the Act.
- 17 **Option A:** The first option is to do nothing. The Act is very clear councils must take *all reasonable steps* to ensure compliance. In addition, the Council now holds two legal opinions which clearly indicate stormwater ponds meet the definition of a pool under the Act and it would be unwise for the Council not to act on that advice
- 18 This option is not recommended
- 19 **Option B:** The Council could publicise the key messages in the legal advice about the likely effect of the Act requirements on property owners, ie that if a pond is associated with a house then it must be fenced even if there is no intention to use it for wading, paddling etc.
- 20 This may be considered to meet the requirements of section 10 of the Act (*‘to take all reasonable steps to ensure that the Act is complied with’*) but only at the most minimal level. There is no means of ensuring the identified owners of the identified properties have been advised of the requirements and therefore no way to ensure the Council has met its obligations under the Act. This information will be difficult to communicate and to understand in such an out of context format.
- 21 This option is not recommended.
- 22 **Option C:** The Council could apply the provisions of the Act in regard to the identified ponds (the Act is clear there is a responsibility to do so) and write to the property owners advising them that legal advice clearly indicates stormwater detention ponds, in some circumstances, meet the definition of a pool as defined in the Act.
- 23 The letter should outline the options available to the owners, ie:
  - If a fence has already been installed contact the Council to arrange for an inspection to verify compliance;

- If they accept the pond needs to be fenced, arrange for a complying fence to be installed and then arrange for an inspection to verify compliance;
  - If they believe the pond is exempt from the requirements of the Act then they should contact the Council to arrange an inspection;
  - If they disagree with the Council's opinion they should obtain their own legal advice.
- 24 This is the recommended option. Staff have prepared a draft letter (refer to Appendix A to this report CS-11-249) and will despatch these to the identified property owners once this report has been received. A copy of this letter will remain on the property file and therefore be made available as part of a Land Information Memorandum (LIM) if requested when the property is offered for sale.

### **Review of the Act**

- 25 The Council has been advised by the Department of Building and Housing that a review of the Fencing of Swimming Pools Act is to be undertaken. This was initially proposed to commence in April 2010 but has been deferred until some time in 2012 due to the Christchurch earthquake. The Council will be making submissions to that review to clarify the situation relating to stormwater ponds. The letter to property owners will recommend they consider taking the opportunity to participate in the public submission process.

### **Financial Considerations**

- 26 There are no financial considerations for the Council but potentially a significant cost to some property owners.

### **Legal Considerations**

- 27 Legal opinions have been sought and are referred to in the body of this report. Copies have previously been distributed to Elected Members.
- 28 Option A (paragraph 17-18 above) refers to the council's obligations under the Fencing of Swimming Pools Act 1987. Councils are also obliged to act lawfully under the Local Government Act 1987. Part 2, Subpart 1 11(b) of the Local Government Act 2002 states the role of a Local Authority is to; *perform the duties, and exercise the rights, conferred on it by or under this Act and any other enactment*

#### Delegation

- 29 As this report is "for information only" Delegation is not an issue. However the report has been referred to this committee as it has delegated authority under section B.2.7.3 to:

*"exercise all of the Council's functions, duties and powers under the Fencing of Swimming Pools Act 1987"*

## **Consultation**

- 30 It is proposed that individual property owners will be contacted by letter which will initiate one on one consultation. Where more than one property shares a pond boundary, neighbourhood meetings will be held as appropriate.

## **Policy Implications**

- 31 There are no policy implications however consideration will be given to potential changes during the District Plan review in regard to the requirement for detention ponds. In tandem with this review the Code of Practice for Urban Subdivision and the Best Practice Subdivision Guidelines will need to be updated.

## **Publicity Considerations**

- 32 A media release has been prepared on this issue.

## **RECOMMENDATIONS**

- 33 The Committee notes that letters to property owners outlining their obligations under the Fencing of Swimming Pools Act 1987 will be posted by the end of August 2011.
- 34 The Committee notes the Council will make a submission on the Fencing of Swimming Pools Act 1987 when it is reviewed and that the submission will be referred to this Committee for approval.

**Report prepared by:**

**Approved for submission by:**

**Ken Smith**

**Tamsin Evans**

**Regulatory Manager**

**Group Manager Community Services**

## **ATTACHMENTS**

**Appendix A Draft letter to identified property owners**

## APPENDIX A

(Date)

(Property Owner)  
(Address 1)  
(Address 2)

Dear (Name)

### Stormwater Detention Ponds

Kāpiti Coast District Council has received legal opinions that clearly identify that stormwater detention ponds, in some circumstances, meet the definition of a pool as defined in the Fencing of Swimming Pools Act 1987 ('the Act').

The Act's main purpose is to promote the safety of young children and it does this by requiring pools to be fenced. Under section 8 of the Act it is the pool owner's responsibility to ensure the pool is fenced. Section 10 of the Act states that, "*every Territorial Authority is required to take all reasonable steps to ensure that the Act is complied with*". The Council has fulfilled its obligation to ensure the Act is being complied with in the district and has applied the law to swimming pools and spas.

Under the Act pools must be fenced unless an exemption applies. The most relevant exemption is section 5(c) of the Act. To fit within this exemption:

(iii) the pool must not be used in association with a house or other similar structure,

**and**

(iv) must not be "*intended for swimming, wading, paddling or bathing.*"

Both parts (i) and (ii) of the definition must be satisfied for the exemption to apply. In other words, if a pond is associated with a house then it must be fenced even if there is no intention to use it for wading, paddling etc.

The legal opinion the Council now holds reflects a 2004 coroner's decision regarding the drowning of a two year old child in an unfenced ornamental pond located 74 metres from a residence. The coroner found the pond was covered by the Act. On taking legal advice, it is the Council's opinion that a pond, when used in association with a house, is required to be fenced to comply with the Act. A pond is likely to be considered to be "*associated*" with a house where it is owned wholly or partly by the owner of the house and where it is integrated into the landscaping of the property.

A desktop review of stormwater ponds in the district has identified your property as one which *potentially* falls within the definition and as such is required to have a complying fence installed to prevent access to the pond by young children.

While I appreciate this notification will come as a surprise there are number of options available to you:

- If you have already recognised the pond poses a risk to children and have installed a fence please contact the Council's Compliance Team to arrange for an inspection to verify compliance (04-2964700);
- If you accept the pond needs to be fenced, arrange for a complying fence to be installed and then make contact as above;
- If you believe the pond is exempt from the requirements of the Act please contact the Council's Compliance Team to arrange an inspection;
- If you disagree with the Council's opinion you should obtain your own legal advice.

I acknowledge installing a complying fence may be costly. A number of fencing options meet the requirements of the Act. For your information, I have included some of these, with approximate per metre costs, with this letter.

In addition, the Council is happy to attend local public meetings to address these issues and explain the detail more fully. If you wish to speak to a member of staff or to request staff attend a meeting please contact our Compliance Team on 04-296 4700.

The Council has been advised by the Department of Building and Housing that a review of the Fencing of Swimming Pools Act is to be undertaken. This was initially proposed to commence in April 2010 but has been deferred until some time in 2012 due to the Christchurch earthquake. The Council will be making submissions to that review to clarify the situation relating to stormwater ponds. We recommend property owners, particularly those who are in the circumstances described in this letter, take the opportunity to participate in the public submission process.

Yours sincerely

Pat Dougherty  
CHIEF EXECUTIVE