Minutes of the
EXTRAORDINARY MEETING OF THE HEARINGS COMMITTEE HELD IN THE COUNCIL CHAMBER, CIVIC ADMINISTRATION BUILDING, PALMERSTON NORTH ON WEDNESDAY, 27 MAY 2015 COMMENCING AT 10.00AM

Members Present: Councillor Tangi Utikere (in the Chair) and Councillors Rachel Bowen and Leonie Hapeta.

(NOTE: The Committee resolved to exclude the public to allow a decision to be made regarding the application for exemption to the fencing of a swimming pool. This was subject to deliberation in private under the Local Government Official Information and Meetings Act 1987 section 48(2)(a)(i). The decision was released to the public and is recorded in the public part of the proceedings.)

4-15 Hearing of Application for an Exemption from the Fencing of Swimming Pools Act 1987 at 8 Clifton Terrace, Palmerston North

Consideration was given to:

(i) Application, dated 12 March 2015, by Mrs Elizabeth Kay Seymour.

(ii) Report, dated 30 March 2015, by the Senior Building Officer - Compliance, Mr Danny McCaul.

The following person appeared before the Committee:

Mr Danny McCaul, Senior Building Officer - Compliance, confirmed the content of his report and had nothing more to add to the recommendations before the committee.

The Committee reserved its decision and,

5-15 Exclusion of Public

RESOLVED that the public be excluded from the following parts of the proceedings of this meeting, namely agenda item 4.

The general subject of each matter to be considered while the public was excluded, the reason for passing this resolution in relation to each matter, and the specific grounds under Section 48(1) of the Local
Government Official Information and Meetings Act 1987 for the passing of this resolution were as follows:

<table>
<thead>
<tr>
<th>General subject of each matter to be considered</th>
<th>Reason for passing this resolution in relation to each matter</th>
<th>Ground(s) under section 48(1) for the passing of this resolution</th>
</tr>
</thead>
<tbody>
<tr>
<td>4. Hearing of Application for an Exemption from the Fencing of Swimming Pools Act 1987 at 8 Clifton Terrace, Palmerston North</td>
<td>personal privacy</td>
<td>(a)(i)</td>
</tr>
</tbody>
</table>

This resolution was made in reliance on Section 48(1)(a) of the Local Government Official Information and Meetings Act 1987 and the particular interest or interests protected by Section 6 or Section 7 of that Act which would be prejudiced by the holding of the whole or the relevant part of the proceedings of the meeting in public were as follows:


... the meeting adjourned at 10.05am ...

... the meeting resumed at 10.05am ...

6-15 Consideration of Applications for Exemption from the Fencing of Swimming Pools Act 1987

Consideration was given to the application for non-compliance.

The COMMITTEE RESOLVED:

6.1 That the application for an exemption from the Fencing of Swimming Pools Act 1987 be granted in terms of the decision attached for the property located at 8 Clifton Terrace, Palmerston North

6.2 That copies of the decision be served on the Applicant, Council Officers and be available for public inspection.

The meeting finished at 10.10am

CONFIRMED THIS 2ND DAY OF JUNE 2015

CHAIRPERSON
BEFORE THE
PALMERSTON NORTH CITY COUNCIL
HEARINGS COMMITTEE

IN THE MATTER of an application BY
Elizabeth Kay Seymour for special
exemption under Section 6 of the
Fencing of Swimming Pools Act 1987

HEARING COMMITTEE: Councillor Tangi Utikere (Chairperson),
and Councillors Rachel Bowen and
Leonie Hapeta

PLACE OF HEARING: Palmerton North City Council
32 The Square
Palmerston North

DATE OF HEARING: Wednesday 27 May 2015

APPEARANCES: Palmerston North City Council:
Mr Danny McCaul, Senior Building
Officer, Compliance

REASONS FOR DECISION

I. THE APPLICATION:

1. The Applicant has applied to the Palmerston North City Council (“the Council”) pursuant to Section 6 of the Fencing of Swimming Pools Act 1987 (“FSPA”), for special exemption from some of its statutory requirements. The Hearings Committee first met on 27 May 2015, when it inspected the pool located at 8 Clifton Terrace, Palmerston North and heard oral and written evidence at a public hearing. Later in this decision we will consider the particular factual circumstances of the application, before arriving at our decision. However, we will first consider the relevant law and other principles, which apply to exemption applications.

II. THE LAW:

2. In 1987 the FSPA was enacted and described in its long title as an act to promote the safety of young children by requiring the fencing of certain swimming pools. We hold that the swimming pool subject to the present application, falls within the definition of a “swimming pool” and is subject to the FSPA.

3. The obligations of owners and persons in control of swimming pools include fencing the pool in compliance with the detailed provisions of the Schedule to the FSPA. Clauses 8 to 10 of the Schedule include the requirements that fences be at least 1.2 metres high; openings in fencing mesh materials shall not exceed 10 mm unless the fence is at least 1.8 metres high when they may be up to 50
mm; gates and doors must be automatically closing; not open inwards towards the immediate pool area; and be fitted with latching devices at various minimum 1.2 metre and 1.5 metre heights.

4. Clause 11 of the Schedule separately provides for where a building forms part of an external pool fence. This position arises in the present application. In such cases Clause 11 states that subject to two conditions, any door giving access to the immediate pool area, need not comply with Clauses 8 to 10. Those conditions are that first, Council must be satisfied that compliance with Clauses 8 to 10 is either impossible, unreasonable or in breach of any other Act. Secondly, that the door must be fitted with a locking device that when properly operated, prevents the door from being readily opened by children under the age of 6 years.

5. Council has delegated to its appropriate officers the enforcement of the provisions of the FSPA. Where a pool meets the Schedule requirements it complies with the Act. This may include where Council officers, under delegated powers, are satisfied that a door in a building, forming part of a fence, satisfies the less restrictive provisions of Clause 11 of the Schedule.

6. In those cases where a fence, including its gates and any doors, does not comply the owner may apply under Section 6 for a Special Exemption. The exemption applications are heard by this Committee. Where a Special Exemption is granted, the owner may lawfully use and operate the pool in terms of the exemption.

7. Under Section 6 the Committee’s discretion to grant exemptions, is controlled by certain statutory conditions. First, the Committee must have regard to the particular characteristics of the pool and any other relevant circumstances. In other words each application for exemption must be considered on a case by case basis in the light of its own facts. Secondly and crucially, the Committee must be satisfied that the “exemption would not significantly increase danger to young children.” The paramount consideration in determining whether to grant an exemption is therefore the safety of young children. The Committee must be “satisfied” that any such danger will not be significantly increased. If it is not so satisfied the application must be declined.

8. Turning to the exercise of our discretion we record that it is conferred to us under Section 6 in broad terms. That drafting approach is also evident in the statutory reference in the FSPA to what has become the vexed issue of the “immediate pool area.” Section 2 defines the “immediate pool area” as meaning “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.” Section 8 requires the “immediate pool area” to be fenced. Several clauses of the Schedule regulate gates and doors opening towards or giving access to the “immediate pool area.” However, the FSPA does not expressly define the extent or exclusivity of the “immediate pool area.” The position is further complicated by the Building Code referring to the differently described “immediate pool surround.” The Building Industry Authority has on several occasions pointed out that those areas are not necessarily the same.

9. To return to the FSPA, the lack of any more precise definition of “immediate pool area” has led the Department of Internal Affairs (“DIA”) to issue non-statutory guidelines and for this Council, at an administrative level, to develop its own. These guidelines are not, as a matter of law, binding on this Committee but are
obviously helpful when used for their particular purposes. Certainly when we come to exercise our decision-making discretion, they will be taken into account.

10. The DIA published guidelines include examples of what it believes portrays a common sense approach to the statutory definition. Under these the “immediate pool area” includes the pool, decking and changing sheds but not a vegetable garden, clothes line, barbecue area, children’s sand pit, slide or swing. Council officers, in dealing with the FSPA and in an endeavour to ensure consistency, have for determining the immediate pool area, adopted a maximum three metre distance from the edge of the pool to the swimming pool fence. The rationale includes a sufficient area to allow sun bathing, running into the pool but excluding non-pool activities listed in the DIA guidelines. All of these criteria while of practical importance in the daily administration of the FSPA, remain only guidelines and not mandatory statutory provisions. We will now proceed to consider the particular facts of Mrs Seymour’s application.

III. EVIDENCE

11. The swimming pool is located at 8 Clifton Terrace, Palmerston North. The property consists of a residential semi-detached dwelling with a stand-alone in ground swimming pool located on the left hand side of the property. The pool is surrounded on two sides by the dwelling and is fenced alongside the neighbour’s right of way on the left boundary and also the immediate neighbour. There are three sets of sliding doors opening out to the swimming pool area. These sliding doors do not comply with the schedule from the FSPA.

12. Mr Danny McCaul, the Council’s Senior Building Officer - Compliance, confirmed the content of his report dated 30 March 2015. He also stated that he believed the only issue of non-compliance related to the operation of the sliding doors which gave access to the immediate pool area, specifically that they were not self-closing and latching.

IV FINDINGS

13. The committee undertook a site visit, prior to the commencement of the formal hearing. We note that the Applicant has a lockable tower bolt fitted at the top of each of the sliding doors which open onto the immediate pool area. Each of these tower bolts are over the minimum 1.5m requirement for a latching device. The Applicant also demonstrated that the keys to the tower bolt were securely stowed.

14. The Committee was satisfied with the position of the deadlocks which when properly operated would ensure that the doors would not readily be opened by children under the age of 6 years. We also noted, that the height of the external fences alongside the neighbour’s right of way on the left, and the immediate neighbour to the rear of the property were in excess of the minimum 1.2m requirement, and therefore compliant.

15. The external gate onto the immediate pool area was also compliant, with an additional padlock affixed. The gate and fences appeared to be constructed in a robust manner to prevent self-access by a child under the age of 6 years.
16. The Committee was also satisfied that the external windows opening onto the pool area were all affixed with stop-locks to prevent access by a child under the age of 6 years, and that the owner fully supervises access to the immediate pool area.

DECISION

17. The Hearings Committee HEREBY RESOLVES pursuant to Section 6 of the Fencing of Swimming Pools Act 1987, that a special exemption be granted to Elizabeth Kay Seymour in respect of the swimming pool located at the residential property situated at 8 Clifton Terrace, Palmerston North, SUBJECT TO the following conditions:

(1) THAT the doors opening onto the immediate pool area are kept locked while the owner is not home and supervising the pool;

(2) That the exemption expires at the change of ownership for the property. The new property owner will need to submit a new application for a swimming pool exemption.

Dated this 2nd day of June 2015.

Councillor Tangi Utikere
Chairperson

Councillor Rachel Bowen          Councillor Leonie Hapeta
Member                          Member