

## Unreasonable to note requirement for fencing on LIM without inspection

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<b>Legislation:</b>	Ombudsmen Act 1975, s 13 and 22 (see appendix for full text); Fencing of Swimming Pools Act 1987; Local Government Official Information and Meetings Act 1987, s 44A
<b>Agency:</b>	Kapiti Coast District Council
<b>Ombudsman:</b>	David McGee
<b>Reference number:</b>	321310
<b>Date:</b>	29 May 2013

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## Summary

This is a complaint relating to the Kapiti Coast District Council's (the Council's) interpretation and application of the Fencing of Swimming Pools Act 1987 (the FOSPA) to properties adjoining storm water detention ponds in its district.

The Council identified certain properties which border storm water detention ponds and so may require fencing under the FOSPA. The Council wrote to the property owners and placed a notation on the LIM relating to each property, stating that the property may require fencing to comply with the FOSPA.

In my opinion, the Council has acted unreasonably by placing such a notation on the property owners' LIMs without further investigation, and in doing so has not discharged its obligations to ensure compliance with the FOSPA. The Council has agreed to remove the information from the LIMs, review each of the affected properties, and take further action where necessary through inspection to ensure compliance with the FOSPA.

## Ombudsman's role

1. Under section 13(1) of the Ombudsmen Act (OA), I have the authority to investigate the administrative acts, decisions, omissions and recommendations of the Council.
2. My role is to consider the administrative conduct of the Council, and to form an independent opinion on whether that conduct was fair and reasonable (section 22(1) and (2) of the OA refer).
3. The relevant text of these statutory provisions is set out in Appendix 1.
4. My investigation is not an appeal process. I would not generally substitute my judgment for that of the decision-maker. Rather, I consider the substance of the act or decision and the procedure followed by the Council, and then form an opinion as to whether the act or decision was properly arrived at and was one that the Council could reasonably make.

## Background

### Legislative background

5. The FOSPA requires the owners of swimming pools to which the Act applies to keep their pools fenced at all times. The FOSPA was passed (as its Long Title bears witness) specifically to promote the safety of young children who may be in danger of drowning or seriously injuring themselves in pools to which they have unrestricted access. The FOSPA defines the type of pools to which it relates, and specifies those pools or excavations to which it is not intended to apply. It confers powers on the local authority to exempt particular pools from some or all of the FOSPA's provisions and it requires

owners to notify the authority of the existence of a pool that is filled or partly filled with water and to comply with reasonable requirements of the authority in regard to the pool. Local authorities are given powers of entry and inspection to enable them to carry out their responsibilities.

6. Section 10 of the FOSPA confers a general obligation on local authorities in the following terms:

*“Every territorial authority shall take all reasonable steps to ensure that this Act is complied with within its district”.*

## Storm water detention ponds

7. The Council is the territorial authority with responsibilities under the FOSPA in the Kapiti district.
8. At some point in 2009 Council officers became concerned with whether the Council was discharging its responsibilities under the FOSPA in regard to what are referred to as storm water detention ponds. These are ponds that have been created from subdivisions within the district (over at least 20 years) to deal with the high water table on which these subdivisions have been carried out. The storm water ponds collect and confine water from the surrounding area and are an important aspect of flood protection.
9. The exact legal status of storm water detention ponds varies. A number are part of the adjoining properties, with the boundaries of these meeting at the centre of the pond, while in the case of some others property owners share boundaries with the boundary of the pond, which is itself a separate property.
10. For the Council these arrangements raised questions of the application of the FOSPA to the adjoining or adjacent properties. Consequently, the Council sought legal advice, first on the application of the FOSPA to storm water detention ponds, and then on how the Council should act.
11. The legal advice received by the Council was that such ponds were “pools” within the meaning of the FOSPA. Whether they were therefore required to be fenced depended upon whether they were considered to be “associated” with a house or other structure on the adjoining property, that is, one modified or intended to be used for swimming, wading, paddling or bathing. If the pond was associated with the house or other structure in this way, it was required to be fenced.
12. The Council conducted a desktop survey to identify properties that might be associated with storm water detention ponds. The survey identified 122 urban properties. (In addition, it was acknowledged that there could be some rural properties affected.) Some of the 122 properties adjacent to a pond had been fenced, but it was not known if this fencing complied with the FOSPA’s prescribed standards.

13. At a meeting of the Council's Regulatory Management Committee on 4 August 2011 it was determined to write to the property owners who had been identified. This letter (sent on 10 August 2011) advised them that the nearby pond might potentially be defined as a pool used in association with their house. It outlined the fencing requirements in those circumstances and invited the owner to arrange for an inspection by the Council.
14. In addition, the Council placed a notation on the Land Information Memorandum (LIM) relating to each property, in the following terms:

*"This property includes part ownership of the storm water detention pond to the rear of the dwelling. Council has previously advised the owner that potentially this pond is captured under the Fencing of Swimming Pools Act 1987 and may require fencing to comply with the Act if it (the pond) is used in association with the house. For further information please contact Council's Compliance officer, Peter Ropata on 04 2964831."*
15. I note that this notation appears to be directed only at those properties that include part ownership of a storm water detention pond. It is not clear whether any action has been taken in respect of properties that border such a pond.
16. The Council's action attracted the attention of the local media.

## Complaint

17. The complainant was one of the property owners who received such a letter.
18. The complainant responded by making a number of requests for information under the Local Government Official Information and Meetings Act (LGOIMA). These were responded to and are not part of this investigation. But the complainant also took issue with the Council's interpretation of the FOSPA and asked it to explain how it understood the provisions of the FOSPA applied to ponds. The complainant was not satisfied with the Council's explanation of the legal basis for its actions, with the way in which the Council had reached its decision, or with, as he saw it, the Council not enforcing the FOSPA while at the same time putting a note on the LIM.
19. The complainant made a complaint to this Office. The complaint was notified to the Council on 9 May 2012. The Council responded promptly to the notification setting out its position together with relevant documentation.

## Application of the FOSPA

20. The FOSPA has been the subject of consideration by the High Court.<sup>1</sup> It has also been referred to in at least one Coroner's finding that was drawn to my attention.
21. It is clear that there is considerable uncertainty about how the provisions of the FOSPA are to be applied to properties adjacent to ponds such as those common in the Kapiti district. This influenced the course determined upon by the Regulatory Management Committee when it decided to write to property owners in the terms that it did. In addition (and as the legal advice makes plain), applying the FOSPA even if its provisions were clear, can only be done on a case by case basis. Whether a particular house or other structure is being used in association with a pond depends upon factors unique to that property. It was for this reason that the Council offered recipients of this letter an inspection. I do not know how many took up this offer. I understand that the complainant did not.
22. I am satisfied that the Council has taken reasonable steps to inform itself of the legal position insofar as it is able to do so. It has commissioned legal advice on two occasions in an endeavour to ascertain the position with regard to storm water detention ponds. I do not consider that it is obliged to initiate legal action, for example, to seek a declaration on the law. It is entitled to proceed on the basis of the legal advice it has received and it is reasonable for it to do so. However, that still leaves open the question of the reasonableness of the steps it has actually taken since receiving that advice.

## Notation on LIMs

23. LIMs are provided for in section 44A of the LGOIMA. They contain information which a local authority holds relating to a property. Certain information must be included in a LIM. But, in addition, a local authority is authorised to include such other information concerning the land that it considers, at its discretion, to be relevant (section 44A(3)).
24. The possibility of including a requirement for a fence under the FOSPA on a LIM was raised in the first piece of legal advice the Council received. It was noted that such information did not have to be provided, though the Council had a discretion to do so. No recommended course for the Council to follow was suggested in that advice. As has been recounted above, the Council has recorded the potential for fencing under the FOSPA on each LIM for the properties identified. Was this a reasonable exercise of its discretion?
25. It appears that the Council's thinking on this is that on the property changing hands the LIM notation will ensure that the potential cost of fencing will enter into consideration when the sale price of the property is negotiated. A purchaser will (theoretically at any

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<sup>1</sup> *Waitakere City Council v Hickman & Ors* (2 August 2004).

rate) be able to negotiate a price that reflects this potential liability (see remarks of the Chief Executive in the *Kapiti Observer*, 8 August 2011).

## Reasonableness of the Council's approach

26. I find this approach to enforcing the FOSPA quite unsatisfactory.
27. Even if the question of fencing did enter into negotiations on sale, there is no guarantee that a purchaser who had received a discount for it would actually fence the property. Certainly, the vendor is unlikely to have any further interest in whether this took place. But even if fencing was attended to on sale, this only addresses enforcement for those properties that come on to the market. Many of the 122 properties may not be sold for decades. As a means of enforcing an Act that is for the safety of children who may be using the ponds for bathing, I find this totally inadequate.
28. Apart from the inadequacies of using LIMs to enforce the FOSPA, it seems to me to be inappropriate for a Council to do so.
29. The FOSPA is a public safety measure. Persons using ponds for bathing purposes do not apply for LIMs before they do so. The FOSPA requires physical barriers (fences) to be erected to protect the public, not notations on LIMs. If a property requires to be fenced under the FOSPA, action must be taken under that Act to enforce the requirement. It is not sufficient to take an action under other legislation that itself has little to do with public safety. In short, a local authority cannot, in my view, reasonably be said to discharge its FOSPA obligations of ensuring compliance with that Act, by a note on a LIM that may have no effect on conduct at all.
30. In this regard, I agree with the complainant. The Council's decision to put notations on LIMs is not an enforcement of the FOSPA. The latter demands action under the FOSPA itself.
31. I also consider these notations to be unreasonable for another reason.
32. It does not seem to me to be a reasonable exercise of the discretion that a Council has under section 44A(3) of the LGOIMA for it to construct information about a property in the way that it has done in this case. If, in a particular case, the Council believed that a property needed to be fenced under the FOSPA, it would be justified in recording its belief (even if contentious) on a LIM. But as far as I know the Council has not formed such a belief in respect of the 122 properties, and certainly not in respect of the complainant's property. That being the case, I cannot see how it can be reasonable for the Council to create information about the property concerned for the purposes of inclusion on a LIM. For the Council's action to be reasonable it would surely need to have addressed whether the house on the complainant's property is adapted for use in association with bathing, etc. in the adjacent pond. It does not appear to have addressed this question and I do not see it as reasonable to put a notation on the LIM relating to the

complainant's property until it does. The same reasoning will, of course, apply in respect of the other properties affected.

## Response to provisional view

33. I issued a provisional view on the complaint to the Council on 27 November 2012 and invited its comments. I received the Council's response on 19 April 2013 and have taken this response into account in forming this opinion. The Council responded as follows:

*"The Council accepts your conclusion that placing information on a LIM is an inappropriate way to enforce the public safety protections intended under the Fencing of Swimming Pools Act (FOSP Act).*

*In response, the Council intends to:*

- Withdraw the information regarding potential FOSP Act liabilities from the 122 properties previously identified and write to the property owners advising this has been done and explaining the reasons why, namely the Ombudsman's conclusion. That letter will also outline the following steps.*
- Conduct a detailed desktop review of the 122 properties to further assess the nature of the ponds and determine, on a case by case basis, whether the unique nature of each reveals whether a house or other structure is being used in association with the pond.*
- Where it can be determined this is not the case no further action will be taken.*
- Where it appears there may be such an association, the Council will write to the property owners and advise them of the situation, advising that Council officers will be in contact to arrange a time to inspect the pond to establish if there are any requirements to fence the pond under the FOSP Act.*

*Letters will be sent to all properties before the end of May 2013. The desktop survey will take longer but, subject to other workloads, this will be completed and letters sent, where required, by 31 August 2013. Inspections that may be required will be arranged with property owners within a reasonable timeframe following the despatch of the letters."*

## Ombudsman's opinion

34. I consider that Council's action in placing the notation on the LIM relating to the complainant's property in the circumstances recorded above, was unreasonable. Indeed, I do not consider that a notation in that form can be justified at all.
35. However, I need to make it clear that this is not a finding that the complainant's property does not need to be fenced under the FOSPA. It may or may not. If the Council considers that it may, the Council should initiate action under the FOSPA. But it is not reasonable (or, I would add, practicable) to employ LIMs to bring about the public safety protections that the FOSPA was designed to effect.

In view of the Council's response to my provisional view (recorded above) no further action on my part is required.

## Appendix 1. Relevant statutory provisions

### Ombudsmen Act 1975

#### 13. Functions of Ombudsmen

- (1) Subject to section 14, it shall be a function of the Ombudsmen to investigate any decision or recommendation made, or any act done or omitted, whether before or after the passing of this Act, relating to a matter of administration and affecting any person or body of persons in his or its personal capacity, in or by any of the departments or organisations named or specified in Parts 1 and 2 of Schedule 1, or by any committee (other than a committee of the whole) or subcommittee of any organisation named or specified in Part 3 of Schedule 1, or by any officer, employee, or member of any such department or organisation in his capacity as such officer, employee, or member.
- (2) Subject to section 14, and without limiting the generality of subsection (1), it is hereby declared that the power conferred by that subsection includes the power to investigate a recommendation made, whether before or after the passing of this Act, by any such department, organisation, committee, subcommittee, officer, employee, or member to a Minister of the Crown or to any organisation named or specified in Part 3 of Schedule 1, as the case may be.
- (3) Each Ombudsman may make any such investigation either on a complaint made to an Ombudsman by any person or of his own motion; and where a complaint is made he may investigate any decision, recommendation, act, or omission to which the foregoing provisions of this section relate, notwithstanding that the complaint may not appear to relate to that decision, recommendation, act, or omission...

#### 22 Procedure after investigation

- (1) The provisions of this section shall apply in every case where, after making any investigation under this Act, an Ombudsman is of opinion that the decision, recommendation, act, or omission which was the subject matter of the investigation—  
appears to have been contrary to law; or
  - (a) was unreasonable, unjust, oppressive, or improperly discriminatory, or was in accordance with a rule of law or a provision of any Act, regulation, or bylaw or a practice that is or may be unreasonable, unjust, oppressive, or improperly discriminatory; or
  - (b) was based wholly or partly on a mistake of law or fact; or
  - (c) was wrong.
- (2) The provisions of this section shall also apply in any case where an Ombudsman is of opinion that in the making of the decision or recommendation, or in the doing or omission of the act, a discretionary power has been exercised for an improper purpose or on irrelevant grounds or on the taking into account of irrelevant considerations, or that,

in the case of a decision made in the exercise of any discretionary power, reasons should have been given for the decision.

- (3) If in any case to which this section applies an Ombudsman is of opinion—
- (a) that the matter should be referred to the appropriate authority for further consideration; or
  - (b) that the omission should be rectified; or
  - (c) that the decision should be cancelled or varied; or
  - (d) that any practice on which the decision, recommendation, act, or omission was based should be altered; or
  - (e) that any law on which the decision, recommendation, act, or omission was based should be reconsidered; or
  - (f) that reasons should have been given for the decision; or
  - (g) that any other steps should be taken—

the Ombudsman shall report his opinion, and his reasons therefore, to the appropriate department or organisation, and may make such recommendations as he thinks fit. In any such case he may request the department or organisation to notify him, within a specified time, of the steps (if any) that it proposes to take to give effect to his recommendations. The Ombudsman shall also, in the case of an investigation relating to a department or organisation named or specified in Parts 1 and 2 of Schedule 1, send a copy of his report or recommendations to the Minister concerned, and, in the case of an investigation relating to an organisation named or specified in Part 3 of Schedule 1, send a copy of his report or recommendations to the mayor or chairperson of the organisation concerned.