



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	51 - 12
Applicant:	Gloria Jean Hall
Assessment Manager:	Logan City Council (Council)
Concurrence Agency: (if applicable)	Not Applicable
Site Address:	58 Chapman Drive, Beenleigh QLD 4502 and described as Lot 141 on RP RP 140871 – the subject site

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) against an Enforcement Notice issued by Logan City Council stating that the swimming pool at the subject site is considered dangerous under Section 248(1)(b) of the *Building Act 1975* (BA) as it currently does not comply with the requirements of the pool safety standard under the BA.

Date of hearing:	26 October 2012
Place of hearing:	The subject site
Committee:	Mr. Robert Hook – Chair
Present:	Ms. Gloria Hall and Mr. Tony Hall - Applicants Ms. Susan Godfrey and Ms. Ingo Toerkel – Council representatives

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the *Sustainable Planning Act 2009* **confirms** the decision of the Assessment Manager to issue an Enforcement Notice requesting compliance with the pool safety standard under the BA.

The structure situated on the subject site is considered to be a swimming pool as defined under the BA. At this time, the swimming pool contains fish, but is not considered to be a fish pond for ornamental purposes. The swimming pool is required to have a barrier complying with the requirements of the pool safety standard and be registered on the pool safety register.

Background

The Council after an inspection of the property on 27 September 2012 issued an Enforcement Notice under section 248(1) of the BA to the Applicant on 28 September 2012. The Enforcement Notice

required the barrier for the swimming pool to be made compliant with the pool safety standard of the BA.

The Enforcement Notice required the Applicant to:

- Erect a temporary compliant pool fence, (including a resuscitation sign) by 5.00pm on **8 October 2012** for the Council compliance officer to inspect and assess the pool fencing as temporarily safe until a private Certifier is engaged AND:
- Engage a Building Certifier to provide a Development (Building) Permit for a permanent complying pool fence AND:
- Install the permanent pool fence in accordance with the Development Permit by 5.00pm on **4 January 2013**;
- Have the pool fence inspected by the Certifier and obtain a Final Inspection Certificate (Form from the Certifier stating the swimming pool fencing complies with the pool fencing standards; OR
- Have a Pool Safety Certificate (Form 23) issued by a Pool Safety Inspector in lieu of a Final Inspection Certificate by **4 January 2013**; OR
- Alternatively, empty the in-ground swimming pool AND render it incapable of holding water by creating a one metre square hole at the lowest point in the pool floor, to protect persons by the **8 October 2012** for reinspection by Council.

The Applicant contends that the structure is no longer a swimming pool but was adapted for use as an ornamental fish pond in 2007 and as such, a fish pond is not required to comply with the requirement of the pool safety standard applicable to a swimming pool.

Material Considered

The material considered in arriving at this decision comprises:

- Form 10 – Application for Appeal/Declaration, lodged with the Committees Registrar on 4 October 2012
 - Letter and Enforcement Notice issued by Logan City Council on 28 September 2012
 - Photographs provided as part of the Logan City Council documentation
 - Information provided by both parties during the on site hearing
 - Photographs taken at the on site hearing
 - Original approval of the swimming pool by Albert Shire Council Ref No 1652/77 on 30 June 1977.
 - Emails provided to the Committee Registrar by Mr Tony Hall
 - Emails provided to the Committee Registrar by Mr. Tony Hall on: (1) classification of the structure and (2) siting information provided by the Logan City Council
 - *Sustainable Planning Act 2009 (SPA)*
 - *Building Act 1975 (BA)*
 - *Building Regulation 2006 (BR)*
 - Building Code of Australia (BCA)
 - Guidelines (October 2012) provided by the Pool Safety Council
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Findings of Fact

The Committee makes the following findings of fact

1. The structure in question was approved as a swimming pool under the BA as indicated by the Albert Shire Council stamped approved drawings on 30 June 1977.
2. Swimming Pools are a class 10b non habitable structure under the BCA.
3. There has been no information provided by the Applicant that identifies a change of use from the classification of the structure as a class 10b swimming pool or that decommissioning of the swimming pool has been undertaken.
4. The structure remains a swimming pool within the definition of swimming pool under the BA.
5. The barrier for the swimming pool does not comply with the requirements of the pool safety standard.

Reasons for the Decision

The structure was approved as a swimming pool by the Albert Shire local authority on 30 June 1977.

This structure falls within the definition of swimming pool under Schedule 2 – Dictionary, of the BA as outlined below. For the purposes of this appeal, points (a),b),(c) and sub(b) provide a definition of a swimming pool and (d) provides a definition of a fish pond used for ornamental purposes.

swimming pool means an excavation or structure—

- (a) capable of being filled with water to a depth of 300mm or more; and
- (b) capable of being used for swimming, bathing, wading, paddling or some other human aquatic activity; and
- (c) solely or principally used, or designed, manufactured or adapted to be solely or principally used, for the purposes mentioned in paragraph (b) despite its current use; and includes a spa pool, spa tub or similar thing (whether portable or fixed) and a wading pool (other than a portable wading pool), but does not include—
 - (d) a fish pond or pool solely or principally used, or designed, manufactured or adapted to be solely or principally used, for ornamental purposes; or
 - (e) a dam or tank solely or principally used, or designed, manufactured or adapted to be solely or principally used, for aquaculture, marine research or storage of water; or
 - (f) a watercourse; or
 - (g) a portable wading pool; or
 - (h) a spa bath situated in a bathroom, other than a spa bath continually filled with water to a depth of more than 300mm; or
 - (i) a birthing pool used solely for waterbirths.

Points (a), (b) and (c) in the definition above provide a clear understanding of what the BA defines as a swimming pool. At the time of construction in 1977, the structure in question was approved as a swimming pool and this definition would have been consistent with the intended use at that time.

Sub point (b) "*despite its current use*" provides that if a structure is approved as a swimming pool then it will remain a swimming pool regardless of what use the structure is being used for at the current time. This could include holding dirt, plants, drained and left empty, or in this case, containing fish. This part of the definition indicates that if a structure is designed, built, and approved as a swimming pool there will need to be a change of use applied to the structure for it to be considered something other than a swimming pool.

This would mean that the swimming pool would need to be decommissioned as a swimming pool

through the change of use process and then it could be approved for the adapted purpose proposed for the structure which in this case is a fish pond for ornamental purposes.

The process of decommissioning the swimming pool and adapting the use to that of a fish pond for ornamental purposes would require a Building Certifier to approve the change of use and issue the appropriate documentation on the re-classification of the structure. This document would change the structure's classification from a class 10b swimming pool to a class 10b fish pond for ornamental purposes.

As there is no approval documentation available which indicates that the swimming pool located at the subject site has been decommissioned as a swimming pool, the structure therefore remains a swimming pool and is not considered to be a fish pond used for ornamental purposes. As such, it is required to have a barrier complying with the requirements of the pool safety standard and be registered on the pool safety register.

Robert Hook
Building and Development Committee Chair
Date: 8 November 2012

Appeal Rights

Section 479 of the *Sustainable Planning Act 2009* provides that a party to a proceeding decided by a Committee may appeal to the Planning and Environment Court against the Committee's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Committee or
- (b) that the Committee had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision.

The appeal must be started within 20 business days after the day notice of the Committee's decision is given to the party.

Enquiries

All correspondence should be addressed to:

The Registrar of Building and Development Dispute Resolution Committees
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