



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	19-006
Appellant:	Timothy John Kenneth Edwards
Assessment Manager:	Sunshine Coast Regional Council
Site Address:	34 Adaluma Avenue, Buddina and described as Lot 442 on RP118150 – the subject site

Appeal

This is an appeal against an enforcement notice issued by the Sunshine Coast Regional Council (**Council**) on 9 February 2019 alleging failure to comply with the *Building Act 1975* regarding swimming pool compliance with pool safety standards, being a contravention of section 232 of the *Building Act 1975*.

Date and time of hearing:	22 May 2019 at 11:00am
Place of hearing:	The subject site
Tribunal:	Wendy Evans – Chairperson Kylie Rojahn - Referee
Present:	Timothy Edwards – Appellant Roslyn McDermott and Peter Chamberlain – Council representatives

Decision:

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(d) of the *Planning Act 2016*:

- (1) Sets the decision of the Council to issue the enforcement notice aside; and
- (2) Orders the Council, to remake the decision. The time to be given to the Council to remake the decision (in accordance with section 254(2)(d) of the *Planning Act 2016*), is to be agreed by the parties to this appeal, acting reasonably.

Background

1. By letters dated 9 February 2019, the Council sent an enforcement notice and a 'non-complying swimming pool barrier' letter to the Appellant (and Ms SL Edwards).

2. Both correspondences concerned the swimming pool barrier erected around the swimming pool, which is an inground pool at the rear of the subject site. The 'non-complying swimming pool barrier' letter informed the recipients that Council had inspected the swimming pool enclosure on 23 January 2019, and had identified seven non-compliance issues (which were replicated in the enforcement notice). The letter further informed the recipient of how to achieve compliance.
3. The subject site itself has a frontage to Adaluma Avenue in Buddina, being to the northern boundary of the subject site. Its eastern and side boundaries adjoin similarly portioned residential allotments.
4. The southern boundary of the subject site is to what appears to be an artificially created canal, which shortly (and without impediment) feeds into the Mooloolah River.
5. The swimming pool is immediately to the rear of the residential dwelling on the subject site, and is effectively surrounded by timber decking, which extends in part beyond the property boundary and over the small sandy beach area which comprises part of the canal area.
6. There are effectively two *entry points* to the swimming pool barrier – one between the pool and the house, and the other off the deck to the rear of the subject site leading to the staircase. The staircase, being approximately 8 steps, leads up from the small sandy beach area in the canal, to the timber decking area.
7. This second entry point to the rear of the subject site, since the enforcement notice was issued, now features two gates. One, which is hereafter referred to as “**the Original Upper Gate**” is located as part of the pool fence at the top of the staircase. The Original Upper Gate:
 - a. Was the gate considered by the Council in producing the enforcement notice;
 - b. Is located on the timber deck, which is located past the revetment wall (and approximately 1.5m into the subject site);
 - c. Is approximately 1m high;
 - d. Opens in towards the swimming pool; and
 - e. Features a latch which is not protected for the effective radius of 450mm from the operating part of the latch.
8. The second gate to the rear entry point of the subject site was installed after the enforcement notice was issued, probably in response to one of the compliance options given in the 'non-complying swimming pool barrier notice' regarding SPFC01. The options to achieve compliance with SPFC01 were:

Option 1

1. *Install a complying swimming pool barrier in line with the revetment wall; and*
2. *Ensure the entire swimming pool barrier is at least 1200mm high; and*
3. *Install a corral to enable the swimming pool gate to open onto your property only as gates must open away from the swimming pool and not over the revetment wall. Or:*

Option 2

1. *Install a complying swimming pool barrier from one side to the other in front or in line with the gazebo; and*
2. *Ensure all outdoor furniture is at least 900mm back from the swimming pool barrier.*

9. The second gate, which is hereafter referred to as **“the New Lower Gate”** is located in line with the revetment wall and is at the base of the existing staircase. It is effectively a gate between the subject site and the canal area. The New Lower Gate swings out and over the canal area.

10. It is best at this juncture to include a photograph supplied by the Appellant on 6 May 2019, showing both the Original Upper Gate and the New Lower Gate, for ease of visualisation.



11. Before the hearing, the Appellant attended to some rectifications which meant that by the time of the hearing, only three of the seven non-compliances remained in dispute. The issues in dispute properly concern the adequacy of the *Original Upper Gate* and its compliance with the relevant standards.

12. More specifically, the remaining issues in dispute (as detailed in the enforcement notice) for determination by this Tribunal are:
- a. Alleged non-compliance with SPFC01 – ensure the swimming pool barrier is in accordance with section 232 of the *Building Act 1975*;
 - b. Alleged non-compliance with SPBC17 – ensure all swimming pool gates open outwards away from the swimming pool enclosure; and
 - c. Alleged non-compliance with SPBC24 – ensure the operational latching device is shielded within an effective radius of 450mm from the operating parts of the latch.

Jurisdiction

13. The enforcement notice the subject of this appeal, was issued under section 248 of the *Building Act 1975*. Under that section, such enforcement notices are taken to be an enforcement notice given under *the Planning Act 2016*, section 168.
14. Section 250 of the *Building Act 1975* confirms that a person who is given an enforcement notice under section 248 of that act “*may appeal to a development tribunal as if the appeal were an appeal under the Planning Act*”.
15. Section 1(1) of Schedule 1 of the *Planning Act 2016* confirms that Table 1 of the same schedule, states the matters that may be appealed to the Tribunal.
16. Table 1, item 6 identifies the Tribunal as having jurisdiction for an appeal against a decision to give an enforcement notice.
17. In addition to the above, Schedule 1, section 1(2) of the *Planning Act 2016* must also be satisfied. The Tribunal confirms that this section has been met on the basis that the enforcement notice given was in relation to a matter involving a matter enlivened under the *Planning Act 2016*, relating to the *Building Act 1975* (see Schedule 1, sections 1(2)(h) and 1(2)(g) of the *Planning Act 2016*).

Decision framework

18. Appeals to the tribunal under the *Planning Act 2016*, are largely addressed in Chapter 6, Part 2 of that act.
19. In terms of the decision framework, the following points are worth observing in this context:
- a. The Council, being the party that issued the enforcement notice, must establish that the appeal should be dismissed (section 253(3) of the *Planning Act 2016*);
 - b. In hearing the appeal, the Tribunal was not bound by the rules of evidence, and could inform itself in the way it considers appropriate (section 249(6) of the *Planning Act 2016*);
 - c. A Tribunal is to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of the *Planning Act 2016*). However, the changes made to the swimming pool safety arrangements in response to the enforcement notice have in part, reduced (by agreement of the parties) the issues in dispute in this appeal.

20. The Tribunal is required to decide this appeal in one of the ways identified in section 254(2) of the *Planning Act 2016*.

Material Considered

21. The material considered in arriving at this decision comprises:

- a. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 15 February 2019;
- b. The 'non-complying swimming pool barrier' issued by the Council to the Appellant on 9 February 2019;
- c. The photograph of the Original Upper Gate and the New Lower Gate supplied by the Appellant on 6 May 2019;
- d. Queensland Development Code, Part MP3.4 (swimming pool barriers), publication date 18 July 2012;
- e. AS1926.2/Amdt 1/2008-04-28, supplied by the Council subsequent to the hearing at the request of the Tribunal; and
- f. The decision of the Building and Development Dispute Resolution Committee in Appeal 05/17 between Ms JER Kater and Mr LL West, against the Sunshine Coast Regional Council, again supplied by the Council subsequent to the hearing at the request of the Tribunal.

Findings of Fact

22. In short, this Tribunal has been satisfied of the following findings based on the evidence given by both parties in the appeal:

- a. The Original Upper Gate is installed on the timber deck, is less than 1200mm high and swings into the pool area;
- b. The New Lower Gate, whilst it was not the subject of the enforcement notice and is not properly within the scope of this appeal, is now installed at the base of the existing staircase, is 1200mm high and swings out from the property boundary and across the canal area (which does reveal a sandy beach area at low tide);
- c. The subject site is 'regulated land' under the *Building Act 1975* (as it features a class 1 building), and accordingly the swimming pool is a 'regulated pool' under the same act (section 231B of the *Building Act 1975*);
- d. The pool safety standard is defined in section 231D of the *Building Act 1975* as being **the QDC, part MP3.4** and any other standard prescribed under a regulation¹;
- e. Irrespective of when the swimming pool was installed, it has been required to comply with the pool safety standard since at least 2 December 2015 (being the day that is 5

¹ A standard prescribed for this section is the display of a resuscitation sign under section 13A of the *Building Regulation 2006*.

years after the commencement of part 4 of the *Building and Other Legislation Amendment Act (No. 2) 2010*²;

- f. **There is no clear reference in the Council's enforcement notice to the QDC, part MP3.4.** The enforcement notice itself expresses failure "*to comply with the Building Act 1975, namely as the owner of residential land on which there is a swimming pool/spa pool, you have failed to ensure that the swimming pool complies with the pool safety standard*". Actions required by the enforcement notice refer to "SPFC" provisions, which appear to be no more than an internal reference system used by Council.
- g. Compliance with the QDC, part MP3.4 can (in its own words) "*only be achieved by:*
- A. *complying with the relevant acceptable solution for the performance requirement; or*
 - B. *formulating an alternative solution that complies with the performance requirement or is shown to be at least equivalent to the relevant requirement; or*
 - C. *a combination of A and B.*"
- h. There is only one performance requirement under part MP3.4. It is P1 which states that "*swimming pools must have a barrier which:*
- (a) *Is continuous for the full extent of the hazard; and*
 - (b) *Is of a strength and rigidity to withstand the foreseeable impact of people; and*
 - (c) *Restricts the access of young children to the pool and the immediate pool surrounds, including access from class 1, 2 or 3 buildings or class 4 parts of buildings located within or outside the pool area; and*
 - (d) *Has any gates fitted with latching devices not readily operated by young children, and constructed to automatically close and latch; and*
 - (e) *Except for indoor swimming pools, does not incorporate any doors providing access to or from a building.*"
- i. The corresponding acceptable solution is A1, which reads as follows:
- "*Swimming pools must have a barrier complying with the Standard, subject to the:*
- (a) *Modifications to the Standard specified in schedule 1; and*
 - (b) *Tolerance limits specified in a guideline for swimming pool barriers made under section 258 of the Building Act 1975.*"
- j. The 'Standard' is defined to mean the "*edition of Australian Standard AS 1926.1 and AS 1926.2 referenced by this part*". A copy of these standards was not placed before the Tribunal.

² No exemption under Chapter 8, Part 2, Divisions 3 or 4 of the *Building Act 1975* was in evidence in this matter.

Reasons for the Decision

23. Since the enforcement notice was issued, modifications to the swimming pool barrier have been made, and the New Lower Gate installed. The New Lower Gate cannot properly form part of the decision appealed here, but its installation is noted by the Tribunal.
24. In issuing the enforcement notice (even when read with the swimming pool barrier inspection report), it was not made clear how the Council undertook its determination properly against the pool safety standard.
25. More specifically, how the decision to issue the enforcement notice was properly arrived at, was not sufficiently clear and lacked evidence of recourse back to the framework for compliance, given in the QDC, part MP3.4 (extracted in paragraph 19(g) above). There is no evidence to suggest that the Council considered compliance with the relevant acceptable solution (being A1, which draws recourse to Australian Standard AS1926.1 and AS1926.2 as modified), **and also** – of any alternative solutions that comply with P1 (or is shown to be at least equivalent).
26. It is accordingly appropriate that the decision of the Council to issue the enforcement notice be set aside, and the Council be ordered to remake the decision whether or not to give an enforcement notice.

Wendy Evans

Development Tribunal Chair

Date: 17 July 2019

Appeal Rights

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

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

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

All correspondence should be addressed to:

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