



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	<b>07-17</b>
<b>Applicant:</b>	Brian McAllister and Carmel McAllister
<b>Assessment Manager:</b>	Martin Porter – Pool Safety Inspector
<b>Concurrence Agency:</b>	Not Applicable
<b>Site Address:</b>	35 Geera Street Coorparoo described as Lot 69 on RP43967 – the subject site

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### Appeal

Appeal under section 532(1)(a)(i) of the *Sustainable Planning Act 2009* (SPA) against a Pool Safety Non-Conformity Notice issued by a pool safety inspector under section 246AB of the *Building Act 1975* (BA).

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<b>Date and time of hearing:</b>	10.30am, 28 April 2017.
<b>Place of hearing:</b>	The subject site
<b>Committee:</b>	Don Grehan – Chair Chris Harris – Member
<b>Present:</b>	Brian McAllister – Applicant and Property Owner Carmel McAllister – Applicant and Property Owner

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### Decision:

The Building and Development Dispute Resolution Committee (the Committee), in accordance with section 564 of the SPA, **sets aside** the Non-Conformity Notice issued by the Pool Safety Inspector and **replaces** the decision being reasonably satisfied that the pool is a complying pool in accordance with 246AW of the *Building Act 1975* (BA).

The Committee directs the Pool Safety Inspector to issue Form 23 Pool Safety Certificate within ten (10) business days of the date of this decision.

## **Background**

The Applicant in seeking surety of the compliance of the existing swimming pool safety barriers engaged the Pool Safety Inspector with the view to securing a Form 23 Pool Safety Certificate for a swimming pool constructed in 1997.

The Pool Safety Inspector inspected the pool barriers on the subject site and, in accordance 246AB of the BA, issued a Form 26 Non-conformity Notice identifying a number of noncompliance's with the pool safety standard.

The Applicant accepts the validity of the identified noncompliance's except for that relating to the strength and rigidity of openings within the pool barrier, in the belief that the requirements in this regard have not materially changed since the installation of the swimming pool. The pool barrier has not been altered in the interim period and, at that time, Council were satisfied that the barrier complied.

The Applicant, dissatisfied with the Non-Conformity Notice to the extent that it relates to the strength and rigidity of openings within the pool barrier, lodged an appeal with the Committees Registry on the 9<sup>th</sup> of March 2017 against the decision of the Pool Safety Inspector.

## **Material Considered**

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Committees Registrar on 09 March 2017.
2. 'Form 26 - Pool Safety Non-Conformity Notice' issued by the Pool Safety Inspector dated 10 February 2017.
3. Verbal submissions from the Applicant and Property Owners at the hearing.
4. The *Sustainable Planning Act 2009* (SPA).
5. The *Building Act 1975* (BA).
6. Queensland Development Code Mandatory Part (MP) 3.4 – Swimming Pool Barriers. (QDC MP 3.4).
7. 'Newsplash', Issue 1, December 2011 published by the Pool Safety Council, Department of Local Government & Planning.
8. Australian Standard AS1926.1 - 2007 (Swimming pool safety - Part 1: Safety barriers for swimming pools), Amendment 1 (AS1926.1-2007).
9. AS1926.2 - 2007. 2 (Swimming pool safety – Part 2: Location of safety barriers for swimming pools), Amendment 1 (AS1926.2 - 2007).
10. Australian Standard AS1926.1:1993 (Swimming pool safety – Fencing for swimming pools).
11. Brisbane City Council Swimming Pool Building Approval Reference No. 13082-97.

## Findings of Fact

The Committee makes the following findings of fact:

- The subject site is a 610m<sup>2</sup> residential allotment on which a swimming pool was approved and constructed in 1997.
- The swimming pool on the subject site is a regulated pool in accordance with Section 231B of the BA.
- Section 232 of the BA prescribes that the owner of a regulated pool must ensure -
  - (a) the pool complies with the pool safety standard for the pool; and
  - (b) all barriers for the pool are kept in good condition
- The BA defines that a complying pool means a regulated pool that
  - (a) complies with the pool safety standard; or
  - (b) if an exemption is in effect under section 245B for the regulated pool—complies with the pool safety standard to the extent the exemption does not apply.
- Section 231D of the BA prescribes that Australian Standard AS1926.1 – 2007, AS1926.2 - 2007. 2 and QDC MP 3.4 are, collectively, the pool safety standard.
- No exemptions are in effect in relation to the regulated pool on the subject site/
- The Applicants are neither proposing to sell or lease the premises. However, for the purpose of satisfying themselves of the compliance of the pool barrier in accordance with Section 323 of the BA, they engaged the Pool Safety Inspector to inspect the pool barriers with the view to securing a Form 23 Pool Safety Certificate.
- On the 10th of February 2017, the Pool Safety Inspector inspected the pool barriers on the subject site and, in accordance 246AB of the BA, issued a Form 26 Non-Conformity Notice identifying the following noncompliance's with the pool safety standard:
  - (1) Barrier horizontal and vertical members lack minimum strength requirements;
  - (2) Non-Compliant gate and latch;
  - (3) Boundary and pump area fences outside of Non-Climbable Zone requirements;
  - (4) Trees, furniture and garden ornaments breach Non-Climbable Zone; and
  - (5) Window barrier directly leading to pool area outside of minimum 100mm openings.
- The Applicants have addressed items 2 to 5 as noted on the Form 26 Non-Conformity Notice dated 10 February 2017 and this is confirmed by the inspection of the Committee.
- This Appeal relates solely to the matters of the strength and rigidity of openings within the barrier.
- The requirements for strength and rigidity of openings within the pool barrier relate to determining that the fencing is sufficiently strong and rigid to prevent an opening from being forced to a size that would allow a young child to gain entry.
- In assessing the strength and rigidity of openings in the pool barrier, the Pool Safety Inspector relied upon both visual inspection to detect obvious defects or deformities and the manual 'squeeze test' procedure as advised within 'Newsplash', Issue 1, December 2011 published by the Pool Safety Council, Department of Local Government & Planning.

- 'Newsplash', Issue 1, December 2011 published by the Pool Safety Council, Department of Local Government & Planning describes the following procedure *"that could be sufficient to decide whether the barrier would appropriately restrict access of young children and meet the pool safety standard"*:
  - "The manual 'squeeze' test of vertical members using the PSI's non-dominant (weaker) hand at the midsection of the vertical members and at a randomly selected panel of the fence."*
  - "The squeezing action applied should be a moderate strength action equivalent to the pressure applied during a firm handshake and not a vigorous or full strength squeezing action. The PSI should remember the required level of resistance to a deforming force only needs to be sufficient to deter a young child pushing through the barrier"*.
- The Applicants believe that the requirements for the strength and rigidity of openings in the pool barrier have not changed since the installation of the swimming pool and appurtenant pool barrier in 1997. The pool barrier has not been altered in the interim period and, at that time, Council were satisfied that the barrier complied with the AS 1926.1 – 2003.
- The Committee confirms that the requirements for the strength and rigidity of openings in the pool barrier are comparatively unchanged between AS 1926.1- 2003 and AS 1926.1 - 2007 however it is mandatory for the Pool Safety Inspector to consider the strength and rigidity of openings when assessing the barrier for the purposes of a Form 23 Pool Safety Certificate.
- Section 3.1 of AS 1926.1 - 2007 limits spacings to 100 mm. It requires the spacing to be maintained below 105 mm under a deforming force of up to 150 Newtons that is applied by the conical end of a 105mm diameter cylindrical solid-faced test object being pulled through the midspan of a fencing panel.
- In assessing the strength and rigidity of openings in the pool barrier, the Committee undertook a series of in situ tests of the pool gate and randomly selected fence panels using a commercially available test object and analogue force gauge (the apparatus) and procedures outlined in Appendix A, Parts A2, A3 and A4 of AS1926.1 - 2007.
- The in situ testing performed by the Committee indicated that the minimum force required to pull the test object through the pool gate and any of the fence panels test was 170 Newtons or greater.

### **Reasons for the Decision**

- The Committee is not satisfied that the "squeeze test" documented in 'Newsplash', Issue 1, December 2011 published by the Pool Safety Council, Department of Local Government & Planning is a valid indication of the Strength and Rigidity of openings in the swimming pool barrier given the variable physical characteristics of the non-dominant hands of individual pool safety inspectors.

- While acknowledging that testing conducted was not undertaken in a controlled laboratory environment, the Committee is reasonably satisfied that, on the basis of the inspection of the pool barrier and in situ testing, the pool is a complying pool in accordance with 246AW of the BA.

**Don Grehan**  
**Building and Development Committee Chair**  
**Date: 17.08.2017**

## **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  
Building Codes Queensland  
Department of Housing and Public Works  
GPO Box 2457  
Brisbane QLD 4001  
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