



## Building and Development Dispute Resolution Committees—Decision

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### *Sustainable Planning Act 2009*

<b>Appeal Number:</b>	49- 16
<b>Applicant:</b>	Mrs Christine Ruth Gay
<b>Assessment Manager:</b>	Redland City Council (Council)
<b>Concurrence Agency:</b> (if applicable)	N/A
<b>Site Address:</b>	5 Dorsal Drive, Birkdale and described as Lot 170 on SL 11484 – the subject site

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### Appeal

Appeal under Section 532 of the *Sustainable Planning Act 2009* (SPA) against the decision of Redland City Council to refuse an application for exemption from compliance with the pool safety standard. The appeal relates to both the application for exemption-disability, and the application for exemption-impracticality.

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<b>Date and time of hearing:</b>	13 December 2016 10:30 am
<b>Place of hearing:</b>	The subject site
<b>Committee:</b>	Mr Chris Harris– Chair Mr Brett England- Member
<b>Present:</b>	Mrs Christine Ruth Gay – Applicant Mr Patrick Gay – Applicant’s partner Mr Paul Hoelscher– Council representative Mr Robbie Newman – Council representative Mr Michael Moran – Phillip Chun & Associates for the Applicant

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### Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA the Committee:

- **confirms** the decision of Council to refuse the exemption for impracticality; and
- **sets aside** the decision of Council to grant an exemption for disability with conditions and replaces it with the following decision:

A barrier complying with the pool safety standard must be constructed around the swimming pool:

- (a) within 3 months of the date of this decision; and
- (b) a pool safety certificate or satisfactory final building permit Form 17 shall be obtained and provided to the Council within 4 months of the date of this decision.

## Background

In March 1988 the Applicant had a swimming pool constructed at 5 Dorsal Drive, Birkdale. Construction of the swimming pool was approved by the Redland Shire Council, as it was then known, with the requirements for swimming pool fencing contained within the Council's local by-laws. Council's records indicate that the pool had a satisfactory Final inspection undertaken in May of that year.

In 1992 the property owners applied to Council under section 49H(9)(B)(a) of the Local Government Act for an exemption of Swimming Pool Fencing with the only access to the property being via a 4m high electronically controlled front gate. The two side boundary fences were approximately 1.6m high constructed of masonry and steel with the remaining boundaries bordering the canal and Moreton Bay. Council considered the Application and duly approved the exemption with a number of conditions, including adequate signage and maintenance responsibilities.

On 1 December 2010 the Queensland Government introduced retrospective legislation requiring all swimming pools on residential land to have a complying pool safety barrier. The Queensland Development Code MP3.4 (QDC MP3.4) references Australian Standard 1926.1-2007 with amendments to some sections of the standard. Property owners with existing swimming pools were granted an extended period of time to achieve compliance with the new legislative requirements. In summary, if a property was sold or leased then the swimming pool had to be fenced to meet the current requirements. All other residential properties that had a swimming pool had until 31 November 2015 to upgrade or install a complying swimming pool safety barrier. This also included any property that had an existing swimming pool fence exemption.

On 1 September 2016 the Applicant applied to the Council under sections 235 and 245 of the *Building Act 1975* (BA) for an exemption from compliance with the pool safety standard on two grounds - disability and impracticality respectively.

On 25 October 2016, the Council considered the Application and made the following decision;

Impracticality---The application for exemption for compliance has been refused.

Reason for refusal of impracticality;

*The swimming pool has direct access from the dwelling. A pool fence barrier is able to be erected around the pool that would comply with the current Pool Fence Safety Standard and no physical impracticality exists for the erection of a complying pool fence barrier.*

Disability --- The application for exemption has been granted with conditions.

Reasons for Exemption for disability;

*Medical reasons outlined by Dr Kenneth F Hossack has been considered and Council has decided to exempt part of the Pool Fencing Standard being Australian Standard 1926.1 part 2.5.4.2, in view of permitting easier access for resident Mr Patrick Gay to access the swimming pool. The exemption applies to the pool fence gate latching height only. That is, as outlined in Australian Standard 1926.1 in lieu of the release height of the latching device being at a minimum height of 1500mm, the release height of the latching device may be a minimum height of 1200mmm.*

Conditions;

- 1. The remaining part of the pool barrier is to comply with the Pool Safety Standard.*
- 2. Only one gate within the pool barrier is permitted to have the exemption*
- 3. This gate must be key locked, with the key removed, at any time Mr Gay is not at the residence and actively using the swimming pool.*
- 4. A complying fence barrier is to be erected within three (3) months of the date of this information notice.*

5. A temporary complying pool fence is to be installed until such time as the permanent pool fence barrier is installed.
6. A pool safety certificate or satisfactory final building permit Form 17 is to be obtained within four (4) months of the date of this information notice.
7. A sign between 0.6m<sup>2</sup> to 0.8m<sup>2</sup> be placed in a clearly visible location at the property boundary entrance and adjacent to the pool gate with the exemption. The sign must state: A pool is located on this property that has an exemption from the Pool Safety Standard.
8. A sign between 0.6m<sup>2</sup> to 0.8m<sup>2</sup> be placed in a clearly visible location adjacent to the pool gate subject to the exemption. The sign must state: This pool gate has been exempted from the Pool Safety standard.
9. Council may inspect for compliance with the above conditions with the giving of 24 hours written notice.

On the 21<sup>st</sup> of November 2016 the Applicant lodged an appeal with The Building and Development Committee Registrar against the Council decision to refuse the Application on impracticality.

### **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 21<sup>st</sup> November 2016.
2. *The Building Act 1975*. (BA)
3. The QDC MP3.4 – Swimming Pool Barriers (QDC MP3.4)
4. Australian Standard 1926-2007 Part 1 and 2 –Swimming Pool Safety (Standard)
5. Redland City Council Information Notice dated 25<sup>th</sup> October 2016.
6. Pool Fencing Exemption report by Phillip Chun and Associates Pty Ltd
7. Redland Shire Council swimming pool fence exemption dated 18<sup>th</sup> November 1992.
8. Medical statement by a Specialist dated 7 October 2016 - provided by the Applicant at the appeal hearing regarding Mr Patrick Gay's (Applicant's partner) medical conditions.
9. Copy of Redland Shire Council building approval for the swimming pool.
10. *Sustainable Planning Act 2009* (SPA)

### **Findings of Fact**

The Committee makes the following findings of fact:

1. On 1 September 2016 the Applicant applied to the Council under sections 235 and 245 of the *Building Act 1975* (BA) for an exemption from compliance with the pool safety standard on two grounds -disability and impracticality respectively;
2. On 25 October 2016, the Council refused the Application for Impracticality and granted the exemption for Disability with conditions;
3. On 21 November 2016, the Applicant lodged an appeal against the Council decision with the Building and Development Committee Registrar;
4. At the hearing, the Applicant provided a medical statement dated 7 October 2016 by a Specialist regarding Mr Patrick Gay's (Applicant's partner) medical conditions;
5. The swimming pool on the subject site does not have a complying pool safety barrier;
6. There is direct access from the dwelling to the pool area;

7. An earlier 1992 exemption from the requirements to have a pool safety barrier existed;
8. The Queensland legislation requires all residential swimming pools to have an effective pool safety barrier under Chapter 8, Swimming Pool Safety of the current BA which provides specific requirements regarding granting exemptions;
9. The intent of the QDC MP3.4 and the Standard is to safeguard 'young children' from drowning or injury in regulated pools. A young child is defined in the Standard and schedule 2 of the BA as being a child under the age of five years;

## **Reasons for the Decision**

During the hearing the Committee asked the Applicant and her partner Mr Patrick Gay (property owners) whether the appeal was against both decisions made by Council regarding impracticality and disability as the appeal documentation referred to impracticality only. The property owners confirmed that both decisions were to be considered.

### Disability

Section 237 of the BA provides specific guidance for local government on granting exemptions. Section 237(2) states:

*The Local government may grant the exemption only if it is satisfied that:-*

- (a) a person with a disability is, or is to become, an occupier of land on which the regulated pool is situated; and*
- (b) it would be physically impracticable for the person, because of the person's disability, to access the pool if it had barriers complying with the pool safety standard.*

Council's decision to grant an exemption to allow the reduction in a single gate latch height from 1500mm to 1200mm was based upon medical reasons outlined in the Doctor's statement accompanying the Application to Council.

However upon review of the medical statement by the Committee, there was no mention of Mr Patrick Gay's inability to reach or operate a complying gate latch. The statement referred to providing additional fencing around the pool, which the Doctor considered would impede Mr Gay's ability to participate in important exercises required for his health. At the hearing, Mr Gay also stated that he did not understand the granting of this exemption as he was and is clearly capable of operating a pool safety gate latch.

The Committee does not believe there is any impediment preventing Mr Gay from operating the gate latch at the minimum height of 1500mm as outlined in the Standard and therefore *sets aside* the Council decision to grant an exemption for disability with conditions.

### Impracticality:

Section 245B of the BA provides the criteria for granting or refusing an Application for exemption by the Local government. It is quite specific in that it provides a number of considerations.

Section 245B(2) states;

*In deciding the application, the local government may consider the following:-*

- (a) whether compliance with the part of the pool safety standard may require the owner to;*
  - (i) move or demolish a building or part of a building; or*
  - (ii) change the location or size of the regulated pool; or*
  - (iii) remove vegetation protected from removal under an Act or a Local law;*

- (b) the cost of the barriers or work required to ensure the pool complies with the part of the pool safety standard, having regard to the nature of any existing barriers for the pool;*
- (c) other matters the local government considers relevant.*

Council confirmed that in making their decision they considered (a) (i)(ii)(iii) and on that basis determined that a pool fence could be constructed around the pool. No other matters under item (c) above, were apparent in their decision.

The property owners provided a report by Philip Chun and Associates (the Report) as part of the Council application and the appeal which addressed the pool fencing exemption Application. The Report discussed in detail how the boundaries of the property met the pool fencing requirements however the only mention of preventing access from the dwelling was section 5.2.5 which stated that the “*Doors from the house have locks to prevent children from entering the pool*”.

The Report did not consider any options related to the installation of a complying swimming pool barrier preventing direct access from the dwelling nor any costs involved with those options, as required under 245B(2)(b). In addition, these options and costs were also not provided or raised during the hearing.

The Committee considered the pool could be reasonably provided with a complying safety barrier and therefore *confirms* Council’s decision to refuse an exemption for impracticality.

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**Mr Chris Harris**  
**Building and Development Committee Chair**  
**Date: 10 January 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  
**Telephone (07) 1800 804 833 Facsimile (07) 3237 1248**