



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	31 - 13
Applicant:	Adrian Francis and Tracy Francis
Assessment Manager:	Coastal Building Approval Service
Concurrence Agency: (if applicable)	N/A
Site Address:	24 Walz Avenue, McEwens Beach and described as Lot 21 on RP 720231 – the subject site

Appeal

Appeal under section 532(1)(b)(ii) of the *Sustainable Planning Act 2009* (SPA) against the issuing of a Non-compliance notice (Form 61) issued by Coastal Building Approval Service with respect to an outdoor swimming pool inspection.

Date and time of hearing:	29 October 2013, 3:00 pm
Place of hearing:	The subject site
Committee:	Bruce Shephard- Chair
Present:	Adrian Francis – Applicant Brad Moohin - Applicant Gordon Heelan and Yan Lu - Coastal Building Approval Service (Assessment Manager)

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA **confirms** the decision of the Assessment Manager to issue a Non-compliance Notice stating the patio is not “permanently open” and does not comply with Queensland Development Code (QDC) M.P. 3.4 - Swimming pool barriers.

Background

The property is located in a beachside suburb just south of the Mackay city area. The house is masonry construction with an extensive patio at the rear of the dwelling. The location of the pool has been selected due to its proximity to the dwelling.

In accordance with Building Development Application Decision Notice (DN) of 7 June 2013 due to the location of the pool, the following conditions were required:

- the pool to be located with a minimum distance of at least 2.0 metres from the coping edge of the inground pool to the southern and eastern edge of the dwelling and or dwelling footing; and

- the pool fence to be located with a minimum distance of 1.2 metres from the outermost projection of the dwelling as shown on the approved plans.

To maintain vehicle access to the back yard, the pool has been constructed less than the approved 2 metres from the patio and the fence run between the patio columns to increase the available space around the pool.

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 2 October 2013.
2. Building approval (reference CBAS 13-0107) issued by the Assessment Manager on 7 June 2013.
3. Form 61 Non-compliant notice issued by the Assessment Manager on 20 September 2013.
4. Email from the Assessment Manager to Applicant dated 24 September 2013.
5. Queensland Development Code MP 3.4. – Swimming pool barriers (QDC MP 3.4)
6. Australian Standard 1926.1-2007 (AS1926.1-2007).
7. Australian Standard 1926.2-2007 (AS1926.2-2007).
8. *Building Act 1975* (BA).
9. *Sustainable Planning Act 2009* (SPA)

Findings of Fact

The Committee makes the following findings of fact:

Construction of the pool and fence was subject to the Building Development Application Decision Notice (Reference CBAS13-0107) issued by the Assessment Manager on the 7 June 2013.

This Decision Noticed contained condition (BA2) which imposes minimum distances the pool and fence is to be located away from the dwelling.

The pool was to be constructed a minimum of 2 metres away from the footings of the dwelling and the swimming pool barrier was to be located a minimum of 1.2 metres away from the outer most projection of the dwelling.

The pool and the fence have not been constructed in accordance with the condition (BA2) contained within Appendix 1 attached to the Decision Notice. The pool fence as constructed does not comply with the Deemed-to-Satisfy (DTS) requirements of the building assessment provisions.

The openings of the patio have been fitted with blinds causing the patio to be no longer "permanently open" and access to the pool is now considered under the QDC MP 3.4 to be directly from the dwelling.

The blinds operate by friction to hold the blind at different heights other than the fully down position which has a latching provision. In any of the open positions the blind would provide only minimal aid to a person seeking access into the pool secure area due to minimal force required to slide the blind down.

The QDC MP 3.4 contains many modifications to the AS 1926.1-2007 which are listed in schedule 1. Modification 28 states:

“Despite anything in this part to the contrary, a barrier may permit direct access to the pool area from a patio, pergola, verandah, deck, balcony or the like (of any class) with at least one permanently open side provided that the barrier otherwise complies with this part”.

Permanently open is defined in the QDC MP 3.4 and means in reference to the side of a patio, pergola, verandah, deck, balcony or the like, open space that is, apart from a swimming pool barrier, continuously open to the external environment and not fitted with blinds, insect screening, shade cloth or the like. The patio in question has all external openings fitted with blinds and can therefore not be considered to have a permanently open side.

Reasons for the Decision

It is clear from the site inspection that the pool fence does not comply with the Building Development Approval and the Acceptable Solutions of the QDC MP 3.4. With all external openings of the patio fitted with blinds, direct access from the patio to the pool area can not comply with QDC MP 3.4 modification 28 as the patio has no permanently open sides.

The issue of a possible Alternative Solution was discussed on site but this was considered outside of the scope of this Committee.

It may be possible that the as-constructed solution meets the performance requirements but an official Alternative Solution should be put forward to the Assessment Manager to be considered and a decision made.

Also section 245 of the BA allows the owner of a regulated pool to apply to the local council who has the power to approve exemptions from complying with a part of the pool safety standard.

Bruce Shephard
Building and Development Committee Chair
Date: 11 November 2013

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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