



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number: 3—09—050

Applicant / Appellant: Vicpas Pty Ltd

Assessment Manager / Respondent: David Bennett - Metropolitan Certification Services Pty Ltd

Concurrence Agency: Not Applicable
(if applicable)

Site Address: 1 Twenty Seventh Avenue, Palm Beach Queensland described as Lots 73 and 74 on Registered Plan No. 41330 — the subject site.

Appeal

Appeal under section 4.2.12A of the *Integrated Planning Act 1997* (IPA) against the decision of the Assessment Manager to give a non-compliance notice pursuant to section 33 of the *Building Regulation 2006* (BR) in relation to the construction of swimming pool fencing.

Date of hearing: 11.00am - Thursday 25 June 2009

Place of hearing: 1 Twenty Seventh Avenue, Palm Beach Queensland.

Tribunal: Don Grehan - Chair

Present: David Winders for Vicpas Pty Ltd as applicant / appellant.
Dominique Winders for Vicpas Pty Ltd as applicant / appellant.

Decision:

The Tribunal, in accordance with section 4.2.34 (2)(b) of the IPA, **changes** the non-compliance notice issued by the Assessment Manager, Ref No. 2869 dated 18 May 2009, by setting aside the following items (as referenced herein):

- (2) Side Boundary Brush fence - Standard requires wires to be "interwoven" with brush fencing timber material.
- (6) Main building entry area- step up from portico area to "green" wall does not restrict access to pool enclosure area.

All other remaining items of the non-compliance notice are confirmed.

Background

The Assessment Manager issued a Development Approval for Building Works with conditions for the construction of a swimming pool, spa and swimming pool fence on the subject site.

During the course of construction, the Assessment Manager conducted the mandatory inspections and, upon the final inspection, issued a non-compliance notice in relation to swimming pool fence pursuant to Section 33 of the BR.

Subsequently, the Applicant has rectified all items identified in the non-compliance notice to the satisfaction of the Assessment Manager, save for the following:

- (1) Side boundary gate and fence are accessible from the raised garden bed (within the private courtyard) and side fence;
- (2) Side Boundary Brush fence - Standard requires wires to be "interwoven" with brush fencing timber material;
- (3) Brush fencing gates do not comply with AS1926.1-1993 - Independent closing operation;
- (4) Diagonal Bracing wires to brush gates provide climbing access;
- (5) Timber roadside gates do not comply with AS1926.1-1993 - Independent closing operation;
- (6) Main building entry area- step up from portico area to "green" wall does not restrict access to pool enclosure area;
- (7) BBQ bench is within 1200mm from the pool gate and fence.

The applicant is dissatisfied with Assessment Manager's decision in relation to the compliance of these remaining items and seeks clarification of and/or exemption from, the requirement to provide swimming pool fencing in accordance with the fencing standards.

Material Considered

The material considered in arriving at this decision comprises:

- 'Form 10 – Appeal Notice' and Applicant's correspondence accompanying the appeal lodged with the Registrar on 18 February 2009, inclusive
- The Assessment Manager's Form 17 and noncompliance notice, Metropolitan Certification Services Pty Ltd Ref No. 2869 dated 18 May 2009.
- Australian Standard AS1926.1-1993: Swimming Pool Safety Fencing For Swimming Pools and Australian Standard 1926.2-1995: Swimming Pool Safety - Location Of Fencing For Private Swimming Pools.
- Verbal submissions from the Applicant at the hearing.
- Easement Document B315272 from the Department of Environment and Resource Management.
- Gold Coast City Council's Operational Works Approval, Ref No. PN30898/03/DA3, dated 20 August 2007.
- IPA.
- BA.
- BR.

Findings of Fact

The Tribunal makes the following findings of fact:

- On 10 November 2008, the Assessment Manager issued with conditions, a Development Approval for Building Works for the construction of a swimming pool, spa and swimming pool fence on the subject site (Metropolitan Certification Services Pty Ltd Ref No. 2869).
- The fencing standards for the swimming pool and spa, pursuant to the BR, Reprint 3F, as applicable at the date of approval, were:
 - (1) Australian Standard 1926.1-1993: Swimming Pool Safety Fencing For Swimming Pools, other than clause 2.14 of the standard and subject to exclusion of clauses 2.3, 2.6 and 2.7 in the particular circumstances outlined in section 14(2) of the BR; and
 - (2) Australian Standard 1926.2-1995: Swimming Pool Safety - Location Of Fencing For Private Swimming Pools, other than clause 1.4.4 of the standard.
- There were no exemptions from the requirement to provide swimming pool fencing in accordance with the fencing standards associated with this Development Approval for Building Works.
- The swimming pool has not been filled with water to a depth of 300mm or more.
- On 18 May 2009, the Assessment Manager conducted a final inspection of the swimming pool, spa and swimming pool fence and issued a non-compliance notice in relation to swimming pool fence pursuant to section 33 of the BR. In the interim period, all items identified in the non-compliance notice have been rectified to the satisfaction of the Assessment Manager save for the following:
 - (1) *Side boundary gate and fence are is accessible from the raised garden bed (within the private courtyard) and side fence;*
 - (2) *Side Boundary Brush fence - Standard requires wires to be "interwoven" with brush fencing timber material;*
 - (3) *Brush fencing gates do not comply with AS1926.1-1993 - Independent closing operation;*
 - (4) *Diagonal Bracing wires to brush gates provide climbing access;*
 - (5) *Timber roadside gates do not comply with AS1926.1-1993 - Independent closing operation;*
 - (6) *Main building entry area- step up from portico area to "green" wall does not restrict access to pool enclosure area;*
 - (7) *BBQ bench is within 1200mm from the pool gate and fence.*
- An easement for access (Ref No. B315272) in favour of 498 The Esplanade, Palm Beach (Lot 75 on RP No. 41330) exists over subject site (Lots 73 and 74 on RP No. 41330). This easement crosses the pool enclosure and, while allowing the provision of gates, requires that vehicular access across the subject site be maintained.

Reasons for the Decision

- All swimming pools on residential land in Queensland are required by law to have compliant swimming pool fencing in place around the pool subject to exemptions.
- The Tribunal does not have jurisdiction, in the first instance, in relation to applications for exemptions. Section 240 of the BA clarifies that applications for exemptions are to be made to the local government and further defines the criteria upon which exemption from the requirements of the fencing standards for an outdoor swimming pool may be approved; namely:

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 the land; and
- (b) it would be physically impracticable for the person, because of the person's disability, to access the pool if it had fencing complying with the fencing standards for the pool.

There has been no application made to the local government and there is no evidence that the exemption criteria are applicable.

- In relation to the seven (7) remaining items on the non-compliance notice, as referenced here in:

(1) *Side boundary gate and fence are is accessible from the raised garden bed (within the private courtyard) and side fence.*

The Tribunal confirms the Assessment Manager's decision.

The raised garden bed within the private courtyard is considered a "climbable object" as it's height above finished floor level is less than 900mm. From this garden bed, access is available to the top of the masonry dividing fence that intersects with, and forms part of the swimming pool fencing and the top of the masonry dividing fence is substantially horizontal and of sufficient width to facilitate access by a young child to the pool enclosure. This is contrary to clause 2.3.1 of AS1926.1-1993.

The location of the swimming pool fencing enclosure may be altered to exclude the masonry dividing fence or the masonry dividing fence may be made non-climbable (i.e. via provision of a 60⁰ capping piece or equal) for a distance of 1200mm out from the point of it's intersection with the pool gate.

(2) *Side Boundary Brush fence - Standard requires wires to be "interwoven" with brush fencing timber material.*

The Tribunal sets aside the Assessment Manager's decision.

In its current configuration, the brushwood fencing is well packed and tightly restrained; there are no projections or indentations formed by the horizontal wires on the outside face of the brushwood fencing that exceed 10mm or that would facilitate climbing.

While Appendix E of AS1926.1-1993 is noted, this Appendix is marked "Informative" and provides examples of pool fencing only, it does not form part of the prescriptive requirements of the Standard. Notwithstanding, the Applicant is reminded of their obligations under section 235 of the BA to maintain the fencing in compliance with the requirements of the prescribed standards.

(3) *Brush fencing gates do not comply with AS1926.1-1993 - Independent closing operation.*

The Tribunal confirms the Assessment Manager's decision.

The independent swing of double leaf, centre opening gates are such that the integrity of the operation of the catch and strike bar latching system cannot be assured to provide automatic latching on the closing of the individual gate leaves. This is contrary to clause 2.11.3.1 of AS1926.1-

1993.

The location of the swimming pool fencing enclosure may be altered to exclude the double gate system or, with the appropriate consideration given to the maintenance of the access rights associated with the easement documents, the gates may be redesigned in a single leaf configuration in accordance with the provisions of AS1926.1-1993.

It is noted that the swing of gates across the property boundaries has been validated on the Landscaping Plans approved by the local government and does not form part of the decision of the Tribunal.

(4) Diagonal Bracing wires to brush gates provide climbing access;

The Tribunal confirms the Assessment Manager's decision.

The diagonal wire used as a tension brace on the leaves of the brush wood double gate forms a substantially horizontal surface that could be used as a hold for climbing. This is contrary to clause 2.7 of AS1926.1-1993.

The diagonal wire brace may be shielded to prevent accessibility or, with consideration given to the separate advice regarding double leaf gates, may be eliminated by re-design.

(5) Timber roadside gates do not comply with AS1926.1-1993 - Independent closing operation

The Tribunal confirms the Assessment Manager's decision.

The independent swing of double leaf, centre opening gates are such that the integrity of the operation of the catch and strike bar latching system cannot be assured to provide automatic latching on the closing of the individual gate leaves. This is contrary to clause 2.11.3.1 of AS1926.1-1993.

The location of the swimming pool fencing enclosure may be altered to exclude the double gate system or, with the appropriate consideration given to the maintenance of the access rights associated with the easement documents, the gates may be redesigned in a single leaf configuration in accordance with the provisions of AS1926.1-1993.

It is noted that the swing of gates across the property boundaries has been validated on the Landscaping Plans approved by the local government and does not form part of the decision of the Tribunal.

(6) Main building entry area- step up from portico area to "green" wall does not restrict access to pool enclosure area;

The Tribunal sets aside the Assessment Managers decision.

The current configuration of pool fencing at this location is not specifically identified in the prescriptive requirements of the Standard and assessment for compliance requires a subjective determination. The primary development includes a raised garden bed area adjacent to the southern side of the building, this garden area runs continuously (east- west) from the outside of, to within, the pool enclosure.

To prevent access to the pool enclosure along this area, a "green wall", comprising a marble tiled, masonry block wall has been constructed as a barrier at 90 degrees across the raised garden bed. At its northern end, the "Green wall" intersects with the building and is impassable, its southern end sits atop the base retaining wall that forms the raised garden bed and is open.

To negate a young child from stepping around the open southern end of this barrier, the "green wall" has been cantilevered approximately 100mm past the outside face of the base retaining wall. Additionally, the base retaining wall has been returned 300mm to form an internal corner immediately behind the green wall.

Having considered these arrangements, the Tribunal is satisfied that an effective barrier exists that will restrict the access of a young child to the swimming pool on the following basis:

- (1) The location of the "green wall" establishes commencement of the swimming pool fencing enclosure.
- (2) The marble tiled facing of the "green wall" is smooth and devoid of hand or footholds that would facilitate climbing.
- (2) Step around access of the cantilevered section would require a young child to effectively suspend itself from the top of the "green wall".
- (3) The construction of the 300mm deep return in addition to the 100mm cantilever, provides a clearance of 400mm to the nearest horizontal surface inside of the pool enclosure that could be used as a foot hold to facilitate completion of a step around procedure. Such clearance is consistent with the requirements of Clause 2.9 of AS1926.1-1993.

It should be noted that the Tribunal's subjective determination is formulated upon the circumstances and construction methods specific to the subject site and should not be relied upon as precedent.

(7) *BBQ bench is within 1200mm from the pool gate and fence.*

The Tribunal confirms the Assessment Manager's decision.

The fixed BBQ bench is located within a 1200mm arc measured from the top of the swimming pool fence and is considered a "climbable object" as it's height above finished floor level is less than 900mm. This is contrary to clause 2.3.1 of AS1926.1-1993.

The BBQ bench may be relocated or the height of the swimming pool fence may be raised, with appropriate consideration given to the location of the operational parts of the latching device, to achieve the requisite separation distances.

Don Grehan
Building and Development Tribunal Chair
Date: 10 August 2009

Appeal Rights

Section 4.1.37. of the *Integrated Planning Act 1997* provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Tribunal or
- (b) that the Tribunal 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 Tribunal's decision is given to the party.

Enquiries

All correspondence should be addressed to:

The Registrar of Building and Development Tribunals
Building Codes Queensland
Department of Infrastructure and Planning
PO Box 15009
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