



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-037
Appellant:	Kim J Polistina
Respondent	Sunshine Coast Regional Council
Site Address:	8 Elinya Street Battery Qld 4551 and described as Lot 679, C92819 – the subject site

Appeal

Appeal under section 229 and item 6 of table 1 of section 1 of schedule 1 of the *Planning Act 2016* against an Enforcement Notice issued by the Sunshine Coast Regional Council on 23 July 2021 alleging failure to comply with the Pool Safety Standard pursuant to section 232 of the *Building Act 1975*.

Date and time of hearing:	Monday, 13 December 13 at 4:30 pm
Place of hearing:	The subject site
Tribunal:	Don Grehan – Chair Sandra Tempest – Member
Present:	Kim J Polistina – Appellant Peter Chamberlain – Council Representative

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(b) of the *Planning Act 2016* **changes** the decision of Council to issue the Enforcement Notice dated 23 July 2021 to a decision to issue a notice in the same form except that the requirement identified in the notice as SPFC40 read instead as follows:

- SPFC40** The Appellant must do all things necessary to (a) obtain a Development Permit for Building Work in relation to the existing swimming pool barrier and (b) obtain a Form 17 Final Inspection Certificate by no later than 4pm Friday the 30th of December 2022.

Additionally, the Tribunal notes that at the date and time of the hearing, the remaining compliance requisitions of the Enforcement Notice, referenced as SPFC10 and SPFC14, had been remedied.

Background

1. Council, in receipt of a complaint, conducted an inspection at the subject site to determine the compliance or otherwise of the barrier associated with a regulated pool. At that time, several issues of noncompliance with the requirements of QDC MP 3.4 were identified and in response Council issued an Enforcement Notice and Swimming Pool Barrier Inspection Report detailing the alleged noncompliance.
2. Council conducted a second inspection at the subject site to confirm compliance with the requirements of the Enforcement Notice at which time supplementary areas of noncompliance with the requirements of QDC MP 3.4 were identified. In subsequent discussions regarding the supplementary areas of noncompliance, the Appellant advised Council of their intention to replace a substantial portion of the pool barrier.
3. Council conducted a third inspection at subject site to ascertain the extent of works associated with the replacement of the pool barrier and the compliance or otherwise of that that work. At that time, several further issues of noncompliance with the requirements of QDC MP 3.4 were identified and the replacement of approximately 11 lineal metres of pool fencing was confirmed. In response Council issued a second Enforcement Notice dated 23 July 2021 and Swimming Pool Barrier Inspection Report detailing the alleged noncompliance's as follows:

Council's Ref.	Description
SPFC10	Ensure horizontal climbable members are at least 900mm apart. (QDC MP3.4).
SPFC14	Ensure the clearance (gap) under the swimming pool barrier and gate/s does not exceed 100mm. (QDC MP3.4 and AS1926.1-2007).
SPFC40	Engage the services of a private building certifier to obtain building development approval and a final compliance certificate (Form 17) for the new/replacement swimming pool barrier. (Building Act 1975).

4. The Appellant, dissatisfied with Council's decision to issue the second Enforcement Notice, lodged an appeal with the Development Tribunal Registry (digitally signed by the Appellant on 29 July 2021).

Jurisdiction

5. The Enforcement Notice the subject of this appeal was issued on 23 July 2021 under section 248 of the *Building Act 1975* and, under section 248(5), the Enforcement Notice is taken to be given under the section 168 of the *Planning Act 2016*.
6. Section 250 of the *Building Act 1975* states that a person who is given an Enforcement Notice under section 248 may appeal to a Tribunal as if the appeal were an appeal under the *Planning Act 2016*.
7. Under section 1(2) of schedule 1 of the *Planning Act 2016*, Table 1 only applies for a Tribunal if one of the preconditions in section 1(2) is satisfied. In this case, section 1(2)(h)(i) is satisfied because the decision to give an Enforcement Notice in this instance was in relation to a matter under paragraph (g) of section 1(2), being a matter relating to the *Building Act 1975*.
8. Table 1 of Schedule 1 accordingly applies for a Tribunal and item 6 of Table 1 states that an appeal may be made against a decision to give an Enforcement Notice.

Decision framework

9. The Council must establish that the appeal should be dismissed (section 253(3) of the *Planning Act 2016*).
10. The Tribunal is required 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*).
11. In hearing the appeal, the Tribunal was not bound by the rules of evidence and was able to inform itself in the way it considered appropriate (section 249(6) of the *Planning Act 2016*).
12. 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

The material considered in arriving at this decision comprises:

13. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on the 30th of July 2021.
14. Revised Enforcement Notice, Reference No. COM21/0113, dated 23rd of July 2021 issued by Sunshine Coast Regional Council.
15. Revised Swimming Pool Barrier Inspection Report, Reference No. COM21/0113, dated 23rd of July 2021 issued by Sunshine Coast Regional Council.
16. Swimming Pool Barrier Inspection Report, Reference No. COM21/0113, dated 26th of February 2021 issued by Sunshine Coast Regional Council.
17. Multiple email correspondence between Council and Appellant and associated photographs detailing the positions of the parties.
18. Form 23 Pool Safety Certificate, Certificate No. PSC0021949 issued by S.R. Norwood, Pool Safety Inspector. QBCC Licence No. PS919158.
19. The *Planning Act 2016* (PA).
20. The *Building Act 1975* (BA).
21. The *Building Regulation 2006* (BR06).
22. Queensland Development Code Mandatory Part 3.4 – Swimming Pool Barriers (QDC MP 3.4).
23. AS 1926.1 - 2007 (Amendment 1) Swimming pool safety – Part 1: Safety barriers for swimming pools.
24. AS 1926.2 - 2007 (Amendment 1) Swimming pool safety – Part 2: Location of safety barriers for swimming pools.
25. Verbal submissions from the Appellant at the hearing.

26. Verbal submissions from Council's representative at the hearing.

Findings of Fact

The tribunal makes the following finding of fact:

27. The subject site is an 546m² uniformly rectangular shaped allotment situated on the south western side of Elinya Street, Battery Hill in an established residential area. A dwelling, attached garage and outdoor living area is located on the site and an inground swimming pool is situated between the dwelling and the allotment boundary adjoining the road reserve.
28. The inground swimming pool was constructed circa 1996. Council records show that while a building approval was issued for the construction of the swimming pool and associated barrier, there was no record that the approval having been finalised.
29. The Appellant purchased the subject site in 2019 and, in accordance with Section 246ATF of the BA, a Form 23 Pool Safety Certificate, Certificate No. PSC0021949 was provided under a contract of sale for the premises
30. The Form 23 Pool Safety Certificate, Certificate No. PSC0021949 was issued by S.R. Norwood, Pool Safety Inspector, QBCC Licence No. PS919158, on the 9th of June 2019 with an expiry date of the 9th of June 2021.
31. On the 19th of January 2021 Council received a complaint relating to compliance of the swimming pool barrier.
32. In response to the complaint, and with the consent of the Appellant, Council conducted a compliance inspection of the swimming pool barrier on the 23rd of February 2021 at which time a number of issues of noncompliance with the requirements of QDC MP 3.4 were identified.
33. On the 26th of February 2021, Council issued an Enforcement Notice and Swimming Pool Barrier Inspection Report detailing the alleged noncompliance. Photographs contained within the Swimming Pool Barrier Inspection Report confirm that a substantial percentage of the existing swimming pool barrier was comprised of hoop top aluminium pool fencing with alternating fleur-de-lis inserts.
34. On the 10th of May 2021 Council conducted a re-inspection of the Swimming Pool Barrier to ascertain compliance or otherwise with the requirements of the Enforcement Notice at which time it was noted that new garage door had been installed adjacent to the existing aluminium pool fencing.
35. On the 16th of June 2021 Council advised the Appellant via email of their view that the horizontal indentations in the garage door exceeded 10mm, were climbable and were located within the 900mm Non-Climbable Zone (NCZ) of the swimming pool barrier and provided options for rectification of the alleged noncompliance.
36. On the 28th of June 2021, the Appellant advised Council via email of their intention to install a new swimming pool barrier and nominated the 7th of July 2021 as the expected completion date.
37. On the 8th of July 2021, Council's attended the site to ascertain the extent of works allegedly undertaken and the compliance or otherwise with the requirements Swimming

Pool Barrier noting that Council were not satisfied that the requirements of the existing Enforcement Notice dated 26th of February 2021 had been satisfied.

38. At time of their inspection of 8th of July 2021 Council noted that a new glass swimming pool barrier incorporating two gates had been installed to separate (a) the pool from the driveway/court yard area and (b) between the dwelling and the north western side boundary to separate the pool from the back yard. Council further noted that gap beneath glass gate situated in the new pool barrier between the dwelling and the north western side exceeded 100mm when an unsecured sleep was removed and that the then the issue climbability of the horizontal indentations in the garage door adjacent to pool barrier remained.
39. On the 11th and 16th of July 2021, the Appellant contacted Council via email to express concerns as to the process, legal standing and behaviour of Council officers in relation to the compliance actions.
40. On the 23rd of July 2021, Council issued an Enforcement Notice and Swimming Pool Barrier Inspection Report detailing the alleged noncompliance. The Enforcement Notice required the Appellant, by Monday, 23 August 2021, to:

Council's Ref.	Description
SPFC10	Ensure horizontal climbable members are at least 900mm apart. <i>(QDC MP3.4).</i>
SPFC14	Ensure the clearance (gap) under the swimming pool barrier and gate/s does not exceed 100mm. <i>(QDC MP3.4 and AS1926.1-2007).</i>
SPFC40	Engage the services of a private building certifier to obtain building development approval and a final compliance certificate (Form 17) for the new/replacement swimming pool barrier. <i>(Building Act 1975).</i>

41. On the 30th of July 2021, the Appellant lodged a 'Form 10 – Appeal Notice' (digitally signed by the Appellant on 29th July 2021), grounds for appeal and correspondence with the Registrar of the Development Tribunal.
42. Section 5(1) of the BA clarifies that building work is defined, in part, as building, repairing, altering, underpinning (whether by vertical or lateral support), moving or demolishing a building or other structure.
43. Schedule 2 (Dictionary) of the BA defines that the term "structure" includes a wall or fence and anything fixed to, or projecting from, a building, wall, fence or other structure.
44. Section 20 of the BA confirms that all building work is Assessable Development, unless the building work is prescribed as Accepted Development under section 21(2) of the BA or a Regulation made under the PA.
45. Section 4 of the BR06 confirms that the provisions contained within Schedules 1 and 2 of BR06 are building work prescribed as Accepted Development for section 21(2)(a) of the BA.
46. Schedule 1, Part 1(2) of BR06 of confirms that building work is prescribed as Accepted Development if relevant provisions complied with where the building work is:
 - (a) minor repairs mentioned in schedule 2B if the minor repairs are carried out by-

- (i) a pool safety inspector under section 246BE of the BA; or is carried out during the reinspection period stated in a nonconformity notice given for the regulated pool; or
 - (ii) a person other than a pool safety inspector and a pool safety inspector issues pool safety certificate for the minor repairs; or
- (b) repairs or maintenance of, or other work for, a barrier for a regulated pool mentioned in schedule 2C.

47. Schedule 4 (Dictionary) of the BR06 defines that the term “specified pool” to mean:

- (a) a complying pool; or
- (b) a pool that is the subject of a current pool safety certificate; or
- (c) a pool that is the subject of a building certificate mentioned in section 246AN of the BA.

48. With reference to the characteristic of the subject site and the regulated pool in question, Schedule 2C, Part 5 of BR06 would allow the constructing a fence that forms the whole or part of a barrier for the regulated pool, or the repairing, replacing or adjusting of an existing fence that forms the whole or part of a barrier for the regulated pool where:

- (a) the only part of the building assessment provisions that applies to the work is the pool safety standard; and
- (b) the fence is no higher than 2m above its natural ground surface; and
- (c) either –
 - (i) the work is carried out during the reinspection period stated in a nonconformity notice given for the regulated pool; or
 - (ii) the regulated pool is a specified pool in relation to which no nonconformity notice has been given and, before the work commences, the owner of the regulated pool has arranged for an inspection of the pool by a pool safety inspector on a day that is not more than 3 months after the day the owner arranged the inspection.

Reasons for the Decision

49. The Tribunal is satisfied that a Development Permit for Building Work, albeit retrospective in nature, is required to be obtained in relation to the replacement pool barrier given that the circumstances surrounding the work constitutes Assessible Development by virtue of the of the following:

- a. No evidence has been provided that the replacement of the barrier for the regulated pool was undertaken under the direction of a Pool Safety Inspector engaged for the purposes of obtaining a Pool Safety Certificate, which is the predicator required by Schedule 1, Part 1(2)(a) of BR06 for undertaking minor repairs of barriers for a regulated pool, including replacing limited parts of the existing barriers, for a regulated pool as Accepted Development pursuant to Schedule 2B(1) of the BR06; and
- b. The regulated pool was not a “specified pool” at the time of the construction of the replacement barrier on or about the 28th of June 2021 given that:
 - (i). The works were not carried out during the reinspection period stated in a nonconformity notice given by a Pool Safety Inspector engaged for the purposes of obtaining a Pool Safety Certificate.

- (ii). The original Enforcement Notice issued by Sunshine Regional Council on the 26th of February 2021 was still in effect at the 28th of June 2021 and confirmed the pool was not a complying pool;
- (iii). Pool Safety Certificate No. PSC0021949 expired on the 9th of June 2021, the pool was not the subject of a current pool safety certificate at the 28th of June 2021; and
- (iv). Noting that no Form 17 Final Inspection Certificate was in effect, the pool was not the subject of a building certificate mentioned in section 246AN of the BA.

Accordingly, the parameters outlined in Schedule 2C Part 5(2)(c)(i) or (ii) of BR06, that predicate undertaking work for barriers for regulated pools in particular circumstances as Accepted Development pursuant to Schedule 2C(5)(1) of the BR06, had not been satisfied.

50. The Tribunal is satisfied that, at the date and time of the hearing on the subject site, the compliance requisitions of the Enforcement Notice, referenced as SPFC10 and SPFC14, had been remedied.



Don Grehan

Development Tribunal Chair
Date: 12th May 2022

Appeal Rights

Schedule 1, Table 2, item 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:

The Registrar of Development Tribunals
Department of Housing and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone (07) 1800 804 833

Email: registrar@epw.qld.gov.au