



## Building and Development Dispute Resolution Committees—Decision

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### ***Sustainable Planning Act 2009***

<b>Appeal Number:</b>	28 – 15
<b>Applicant:</b>	Noosa Building Certifiers – (Luke Neller)
<b>Assessment Manager:</b>	Noosa Building Certifiers (Terry Neller, Building Certifier)
<b>Concurrence Agency:</b> (if applicable)	Noosa Council (Council)
<b>Site Address:</b>	29 Netherby Rise, Sunrise Beach, and described as Lot 285 RP 136796 – the subject site

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### **Appeal**

Appeal under section 527 of *Sustainable Planning Act 2009* (SPA) against the Decision Notice of the Assessment Manager to refuse a swimming pool, side boundary masonry constructed wall, front boundary masonry constructed wall, and masonry constructed pool fence. Noosa Council (Council) as the Concurrence Agency directed the Assessment Manager to refuse the structures as they did not meet and could not be conditioned to meet the Specific Outcomes of the Noosa Plan.

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<b>Date and time of hearing:</b>	10.00am on Monday 7 September 2015
<b>Place of hearing:</b>	The subject site - 29 Netherby Rise, Sunrise Beach
<b>Committee:</b>	Richard Prout – Chair
<b>Present:</b>	Terry Neller – Noosa Building Certifiers – (Applicant/Assessment Manager and property owners representative) Paul Riley – Council representative Rob Wibrow – Council representative Glen Conforti – Council representative

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### **Decision:**

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA **sets aside** the decision of the Assessment Manager to refuse the swimming pool, side boundary masonry constructed wall, front boundary masonry constructed wall, and masonry constructed pool fence at the direction of Council. The Committee approves the structures with the following conditions:

- The site must be landscaped in accordance with the following drawings within 40 business days from the date of this decision notice;

- outside noosa, Dated 15/10/2015, Sheet 1 and 2, Client John Percey, 29 Netherby Rise, Sunrise Beach. Subject to the following amendments:
  - (a) The Fraser Island Apple genus species should be *Acronychia Imperforate*; and
  - (b) The minimum pot size for the *Acronychia Imperforate* must be 75 litre or greater.
- The proposed landscaping must be retained and maintained in accordance with the above landscape plan for the life of the structures in order to soften the visual impact of the structures when viewed from the street;
- With the exception of the two side boundary fences the area between the front road boundary and the dwelling/garage must remain open and not incorporate any additional structures i.e. screens/fences/boundary wall etc.; and
- The Applicant must apply for and gain a Development Approval for Building Work for the structures which are the subject of this Decision.

## Background

The subject site is a 675 m<sup>2</sup> allotment located at 29 Netherby Rise, Sunrise Beach, and is zoned Detached Housing under the Noosa Plan.

The existing dwelling at the site was built in the 1980s and has a front road boundary setback of approximately 11m from Netherby Rise. By locating the dwelling toward the rear of the allotment the designer was able to maximise the ocean views afforded by the allotment.

However due to the positioning of the dwelling there is only limited space at the rear of the building and the only practical location for a swimming pool on the site is between the dwelling and the front road boundary. The natural ground level between the dwelling and the front road boundary slopes towards the road with an approximate change in ground level of 3.2m.

The property owners engaged Noosa Cooloola Pools Pty Ltd (the Builder) to design the pool, obtain the required development approvals and carry out the building work. The Builder lodged a Development Application for Building Work with Pacific BCQ Building Certification Queensland (Pacific BCQ) in May 2014 on the owner's behalf for the following structures:

- Class 10b swimming pool and surrounding podium located within the prescribed front road boundary setback and northern side boundary setback; and
- Class 10b masonry constructed wall surrounding the pool/podium area and located within the prescribed front road boundary setback and northern side boundary setback.

None of the drawings lodged with Pacific BCQ detailed the overall height of the structures above natural ground level. The Development Approval for Building Work issued by Pacific BCQ did not include any conditions limiting the overall height of the structures above natural ground level.

The swimming pool when built did not comply with the Acceptable Solution A2 E(ii) (Splash proof fencing) of the Queensland Development Code MP 1.2 (QDC MP1.2) and the remaining structures did not comply with the minimum setback requirements of the Noosa Plan.

Pacific BCQ disengaged from the project on the 29 May 2015. The owner's through their Builder engaged Noosa Building Certifiers to complete the building certification process.

Noosa Building Certifiers (Assessment Manager) lodged a request for referral agency response for building work with Noosa Council in July 2015 addressing the Performance Criteria of the Noosa Plan. However the non-conformity with Acceptable Solution A2 E(ii) (Splash proof

fencing) of the Queensland Development Code MP 1.2 (QDC MP1.2) was not addressed as part of the application process.

Noosa Council issued a Concurrence Agency Response on the 18 August 2015 instructing the Assessment Manager to refuse the structures.

The Assessment Manager issued a Decision Notice on the 24 August 2015 refusing the structures as directed by the Concurrence Agency.

The Building and Development Dispute Resolution Committees (the Committee) received application for appeal Form 10 from the Noosa Building Certifiers on the 25 August 2015.

### **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 25 August 2015;
2. IDAS Form 1 - Application Details, IDAS Form 2 - Building work requiring assessment against the *Building Act 1975*;
3. Form 56 (Notice to the local government that a private certifier has been engaged) – issued by Noosa Building Certifiers dated 3 June 2015;
4. Noosa Council Application Form – Request for referral agency response for Building Work dated 9 July 2015;
5. Report from Noosa Building Certifiers dated 24 July 2015 to Noosa Council addressing the performance criteria of the relevant sections of the Noosa Plan;
6. Letter of support dated 24 August 2015 from the owner of 31 Netherby Rise, Sunrise Beach neighbor on the northern side of the subject site;
7. Concurrence Agency Response from Noosa Council dated 18 August 2015;
8. Decision Notice issued by Noosa Building Certifiers dated 24 August 2015 refusing the swimming pool, podium, and combined retaining walls and pool fencing;
9. Notice of Engagement As A Private Building Certifier – issued by Pacific BCQ Building Certification Queensland for a swimming pool date 8 May 2014;
10. Decision Notice, issued by Pacific BCQ Building Certification Queensland dated 22 May 2014 approving the swimming pool, podium, and masonry constructed wall surrounding the pool/podium area located within the prescribed front road boundary setback and northern side boundary setback;
11. Form 15 (Compliance Certificate for building Design or Specification) for a reinforced concrete pool issued by Sean Richardson of SCG Consulting Engineers dated 9 May 2014;
12. The following drawings:
  - Noosa Cooloola Pools P/L, Site Plan 29 Netherby Rise, Sunrise Beach (Not dated);
  - Noosa Cooloola Pools, 3D View 1, dated 29 April 2014;
  - Noosa Cooloola Pools, 3D View 2, dated 29 April 2014;

- SCG Consulting Engineers, pool details, dated May 2014 drawing 24135-PD;
- David Lau Cadastral Surveyor, drawing HINT6997, dated 1 July 2015, preliminary desktop;
- outside noosa, Dated 15/10/2015, Sheet 1 and 2, Client John Percey, 29 Netherby Rise, Sunrise Beach.

13. Form 22 (Notice of discontinuance of engagement) – issued by Pacific BCQ Building Certification Queensland dated 29 May 2015;
14. Verbal submissions at the hearing from all parties to the appeal;
15. The Noosa Plan;
16. The Queensland Development Code MP 1.2;
17. The *Sustainable Planning Act 2009*;
18. The *Building Act 1975*.

## Findings of Fact

The Committee makes the following findings of fact:

### Subject Site

1. The subject site is a 675 m<sup>2</sup> allotment located at 29 Netherby Rise, Sunrise Beach, and is zoned Detached Housing under the Noosa Plan;
2. The existing dwelling onsite was built in the 1980s with a front road boundary setback of approximately 11m from Netherby Rise;
3. The ground level between the dwelling and the front road boundary slopes towards the road with a change in ground level of approximately 3.2m;
4. A swimming pool with surrounding podium has been built within the prescribed front road boundary and northern side boundary namely:
  - Swimming pool and podium area – located approximately 2m – 2.5m from the front road boundary and less than 1m from the northern side boundary. At its highest point (north east corner) the podiums finished floor level is approximately 2.55m above natural ground level; and
  - Masonry wall surrounding pool podium – located approximately 2m from the front road boundary and encroaches approximately 300mm into the allotment on the northern boundary. At its highest point (north east corner) the top of the wall is approximately 3.75m above natural ground level;

It should be noted that the owners on the northern property (31 Netherby Rise) have provided the owners of 29 Netherby Rise with a letter of support for the development. The Applicant stated at the Hearing that the owners of 31 Netherby Rise were happy to treat the masonry wall as a dividing fence between their properties and had no objections to the encroachment.

5. The allotment to the northern side of the subject site has a swimming pool in a similar location however the finished ground level is considerably lower than the subject site;
6. The streetscape in the surrounding area of the subject site predominately consists of open fronted allotments with soft landscaping and where walls have been erected within the front road boundary setback they are generally complying with the

requirements of the planning scheme i.e. boundary walls are below 2 m in height, and retaining walls are below 1 m in height.

## Application Process

1. The Builder lodged a Development Application for Building Work with Pacific BCQ in May 2014 on the Applicants behalf for the following structures:
  - Class 10b swimming pool and surrounding podium located within the prescribed front road boundary setback and northern side boundary setback; and
  - Class 10b masonry constructed wall surrounding the pool/podium area and located within the prescribed front road boundary setback and northern side boundary setback.

2. Pacific BCQ issued a Development Approval for Building Work on the 22 May 2014 for the above structures;

Note: Both structures were located within the prescribed front road boundary setback and side boundary setback. However the drawings approved by the Building Certifier do not detail the height of the structures above natural ground level.

3. The structures when built did not comply with the minimum setback requirements of Schedule 1 (Minimum Boundary Setbacks for Buildings and Other Structures) of the Noosa Plan- as per the Schedule 1:
  - The maximum height of a Class 10b screen/fence within 1.5 m of a side or rear boundary or within 6 m of a front road boundary is 2 m; and
  - The maximum height of Class 10b swimming pool and deck/podium area within 1.5 m of a side or rear boundary or within 6 m of a front road boundary is 1 m.

4. Natural ground surface or natural ground level is defined in the Noosa Plan as follows:

***natural ground surface or natural ground level for an allotment means:***

*a) the ground level of the allotment on the day the first plan of survey showing the allotment was registered; or*

*b) if the ground level on the day mentioned in paragraph (a) is not known, the natural ground surface as determined by a cadastral surveyor.*

5. The swimming pool when built did not comply with the Acceptable Solution A2 E(ii) (Splash proof fencing) of the Queensland Development Code MP 1.2 (QDC MP1.2);
6. Pacific BCQ disengaged from the project on the 29 May 2015. The property owner through his Builder engaged Noosa Building Certifiers as the new Assessment Manager to complete the building certification process;
7. The Assessment Manager lodged a request for referral agency response for building work with Noosa Council on 9 July 2015 against Specific Outcome 14.95 Siting, Table 14-44, Division 11 – Building Works Code, of the Noosa Plan;
8. The non-conformity with Acceptable Solution A2 E(ii) (Splash proof fencing) of the Queensland Development Code MP 1.2 (QDC MP1.2) was not addressed as part of the request for referral agency response for building work lodged by the Assessment Manager;
9. Section 33 (Alternative provisions to QDC boundary clearance and site cover provisions for particular buildings) of the *Building Act 1975* allows a planning scheme to include alternative provisions for single detached Class 1 buildings and Class 10 buildings or structures to the provisions of the QDC for boundary clearance and site cover. Table 14-44, of Division 11 Building Works Code clearly states that Schedule 1 is an alternative provision to QDC Parts MP1.1 and MP1.2, P1, P2 and P7;

10. Noosa Council issued a Concurrence Agency Response on the 18 August 2015 instructing the Assessment Manager to refuse the structures as;

*The application is refused as the proposed development does not comply and cannot be condition to comply with the following performance criteria:*

**Building Works Code**

**14.95 Siting**

**Setbacks**

*O1 Buildings and other structures are appropriately designed and sited to – (a) provide amenity for users of the premises as well as preserve the visual and acoustic privacy of adjoining and nearby land uses;*

*The swimming pool area overlooks the neighboring property to the north interfering with that neighbor's visual privacy. At the time of the construction there were no constraints on the position of the pool or the height of the pool wall. The height of the swimming pool pool and pool area could have been reduced at the time of construction and setback from the side boundary to provide the neighboring property some visual privacy.*

*There were no physical design constraints on the premises that provided justification for the proposal. The design could have been cut into the block to provide a more acceptable solution to reduce building heights. It is generally common practice that a sloping block accommodates an element of cut in creating a pad levels, however the design proposal does not make any attempt to reduce overall construction heights using this design process.*

*Buildings and other structures are appropriately designed and sited to – (b) maintain the visual continuity and pattern of buildings and landscape elements within the street:*

*There are existing examples of pools set in the front six metres on the street. The pool is on a curve to the road and has a prominent outlook, because of the sizes and mass. Cars and pedestrians look directly at the pool when approaching from the south.*

*The sizes and height of the pool wall is noticeable from the northern approach to the road, even with the existing vegetation between it and the road boundary.*

*The pool presents a bulk and mass that dominates the streetscape.*

*For these reasons, the pool does not maintain the visual continuity or pattern of buildings and structures within the street.*

11. The Assessment Manager issued a Decision Notice on the 24 August 2015 refusing the structures as directed by the Concurrence Agency;

12. The Building and Development Committee Registrar received the application for appeal, Form 10 from Noosa Building Certifiers on the 26 August 2015.

**Reasons for the Decision**

The Committee conditionally sets aside the decision of the Assessment Manager to refuse the structures at the direction of Council for the following reasons:

- At the hearing, the appeal parties discussed the option of increasing the landscape screening along the front of the allotment in order to fully screen the pool and surrounding masonry walls from the street;
- The hearing was suspended to allow the property owner's the opportunity to develop a revised landscape plan for Council to consider;

- The Applicant submitted a landscape plan to Council and the Committee on the 15 October 2015;
- The Council advised the Committee on the 22 October 2015 that they were satisfied with the landscape plan with a number of minor amendments;
- The Committee agrees with Council's reasoning for refusing the structures, as they do not meet the Specific Outcomes of the Noosa Plan namely:
  - They are in extreme conflict with the surrounding streetscape;
  - They do not maintain the visual continuity and patterns of buildings and landscape elements within the street; and
  - They do affect the amenity of the allotment to the north of the site.
- The Committee is satisfied that a swimming pool and surrounding podium area could have been designed to meet the property owner's needs and Specific Outcomes of the Noosa Plan;
- The Committee does however acknowledge that the property owners did engage the services of a licensed builder to develop the design for the pool and surrounding structures and the builder in turn engaged a licensed Building Certifier to assess the development against the provisions of the relevant Codes.

Neither the drawings provided by the builder, nor the development approval issued by the Building Certifier, identify the maximum allowable height for the structures above natural ground level.

Given the slope of the allotment and the location of the structures, within the prescribed front road boundary setback and side boundary setback, this issue should have been addressed prior to any building work commencing.

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**Richard Prout**  
**Building and Development Committee Chair**  
**Date: 27 October 2015**

## **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**