



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	05 - 17
Applicant:	Ms. J.E.R Kater & Mr. L.L West
Assessment Manager:	Sunshine Coast Regional Council (Council)
Concurrence Agency: (if applicable)	Not Applicable
Site Address:	25 Jessica Boulevard, Minyama Q 4575 described as Lot 84 on M9306 (the subject site)

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) against the decision of Sunshine Coast Regional Council to give an Enforcement Notice under Section 248 of the *Building Act 1975* for failing to ensure that the pool located at the subject site complies with the pool safety standard.

Date and time of hearing:	06 March 2017 at 10.30am
Place of hearing:	The subject site
Committee:	Mr. Andrew Parker – Chair Mr. Brett England – Member
Present:	Mr. Leonard West – Applicant and Property Owner Ms. Julia Kater – Applicant and Property Owner Mr. Peter Chamberlain – Council representative Ms. Roslyn McDermott – Council representative

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA **changes** the Enforcement Notice issued by the Council as follows:

Under heading “3. ACTIONS REQUIRED BY ENFORCEMENT NOTICE”, the Committee retains item SPFC01, but entirely deletes subsequent items SPFC02; SPFC06; SPFC09; SPFC10; SPFC11; SPFC19; and SPFC38.

The Committee also rewords item SPFC42 to the following:

- SPFC42 As confirmation that the above item SPFC01 has been satisfied, obtain one (1) of the following and forward copies to Council for their records:
- A Pool Safety Certificate (Form 23) from a licenced Pool Safety Inspector confirming compliance with Acceptable Solution A1 of the QDC MP3.4; or
 - A Building Development Permit for the entire pool safety barrier issued by a building certifier that incorporates an alternative solution (as per s14 of the *Building Act 1975*) that complies or is at

least equivalent to Performance Requirement P1 of the QDC MP3.4, along with a Form 17 Final Certificate from the Certifier for that same Development Permit.

The Committee also extends the date that compliance must be achieved from Thursday, 2 March 2017 to **Friday, 21 April 2017**.

Background

The subject site is located at 25 Jessica Boulevard, Minyama. The site is irregular in shape, and contains an easement along the full length of the left side boundary for the purposes of stormwater drainage. There is a dwelling on the site for which a Building Permit was issued in 1987 and also an in-ground swimming pool which Council records indicate was approved in 1990 however Council advise the actual file is not available.

A revetment wall is constructed adjacent to and along the rear property boundary, separating the site from a tidal canal. The property also has access to a jetty walkway and pontoon which is located entirely outside the subject site as identified on the registered Survey Plan. The jetty walkway and pontoon allow pedestrian access from the canal directly to the rear boundary of the property.

On 16 January 2017, Council inspected the as a result of a complaint from a member of the public about safety concerns related to the pool safety barrier. During this visit, Council identified a number of non-compliant matters in relation to the swimming pool barrier and later re-inspected the site on 25 January 2017 to take additional photographs of the non-compliant pool fencing items for their records.

On 31 January 2017, Council issued the Applicants with an Enforcement Notice under Section 248 of the *Building Act 1975* (BA) advising the swimming pool barrier was non-complaint with the pool safety standard and that the Applicants had until Thursday, 2 March 2017 to make the pool barrier compliant.

Council also attached a Swimming Pool Barrier Inspection Report to the Enforcement Notice, dated 31 January 2017, which provided photographic and written details of how the Applicants could achieve compliance with the standard.

On 16 February 2017, the Applicants lodged an application for appeal Form 10 with the Building and Development Committees Registrar.

Material Considered

The material considered in arriving at this decision comprises:

1. Form 10 – Appeal Notice, grounds for appeal and correspondence accompanying the appeal received by the Committees Registrar on 16 February 2017;
2. Enforcement Notice (reference COM17/0062) issued by Council to the Applicants dated 31 January 2017;
3. Swimming Pool Barrier Inspection Report and covering letter (reference COM17/0062) advising non-compliance issued by Council to the Applicants dated 31 January 2017;
4. Information regarding the history of Building Approvals for the site provided by Council to the Committee by email on 01 March 2017;
5. A copy of the registered survey plan for the site provided by Council to the Committee by email on 01 March 2017;
6. Verbal submissions from the Applicants at the hearing;

7. Verbal submissions from Council representatives at the hearing;
8. The *Building Act 1975* (BA);
9. The Building Regulation 2006 (BR);
10. The Queensland Development Code *MP3.4 – Swimming Pool Barriers* (QDC MP3.4);
11. Australian Standard *1926.1-2007 (Amndt 1) Swimming Pool Safety - Part 1: Safety barriers for swimming pools*;
12. Australian Standard *1926.2-2007 (Amndt 1) Swimming Pool Safety - Part 2: Location of safety barriers for swimming pools*;
13. The *Sustainable Planning Act 2009* (SPA);

Findings of Fact

The Committee makes the following findings of fact:

1. The subject site is located at 25 Jessica Boulevard, Minyama. The site is irregular in shape, and contains an easement along the full length of the left side boundary for the purposes of stormwater drainage.
2. There is a dwelling on the site for which a Building Permit was issued in 1987 and also an in-ground swimming pool which Council records indicate was approved in 1990 however Council advise the actual file is not available.
3. A revetment wall is constructed adjacent to and along the rear property boundary, separating the site from a tidal canal.
4. The property also has access to a jetty walkway and pontoon which is located entirely outside the subject site as identified on the registered Survey Plan. The jetty walkway and pontoon allow pedestrian access from the canal directly to the rear boundary of the property.
5. The pool barrier encloses almost the entire rear yard of the property from the rear alignment of the dwelling to the rear property boundary. It utilises both side boundary adjoining neighbour fences with a standard style aluminium pool fence constructed across the rear boundary. A glass-style isolation fence is provided behind the rear patio of the dwelling preventing direct access from the dwelling to the pool area. This portion of fence contains a pool gate to permit access to the pool area. A second aluminium pool gate and associated fence is provided between the right side boundary fence and the rear right corner of the dwelling allowing for access from the front of the property to the rear pool enclosure. A third pool gate is positioned in the barrier along the rear boundary, atop the revetment wall, providing access from within the pool barrier to the jetty walkway and pontoon.
6. On 31 January 2017, Council issued the Applicants with an Enforcement Notice under Section 248 of the BA, requiring the following by Thursday 2 March 2017:

<i>SPFC01</i>	<i>Ensure the swimming pool barrier is in accordance with section 232 of the Building Act 1975.</i>
<i>SPFC02</i>	<i>Ensure the swimming pool barrier is a permanent and rigid structure.</i>
<i>SPFC06</i>	<i>Ensure the outside of the swimming pool barrier has a non-climbable zone for a quadrant radius of 900mm (measured out and down) including an additional 300mm clear area (refer diagram in report).</i>
<i>SPFC09</i>	<i>Ensure the swimming pool barrier provides a continuous 300mm internal clear area on the inside of the swimming pool barrier.</i>
<i>SPFC10</i>	<i>Ensure all horizontal members are at least 900mm apart.</i>

- SPFC11 *Ensure all vertical members have a maximum spacing of 100mm.*
- SPFC19 *Ensure all swimming pool gates self-close and self-latch from any stationary position through the full arc of their swing including from the resting position.*
- SPFC38 *Ensure a securely fixed current and legible resuscitation sign is clearly visible within the swimming pool area. The sign must be a minimum of 300mm x 300mm, durable, of weatherproof material and include a statement of how to act in an emergency together with the emergency phone 000 in accordance with section 13A of the Building Regulation 2006.*
- SPFC42 *Ensure a swimming pool safety certificate (Form 23) is issued by a licensed Pool Safety Inspector for the swimming pool barrier.*

7. Also on 31 January 2017, Council issued the Applicants with a Swimming Pool Barrier Inspection Report and covering letter (reference COM17/0062) as an attachment to the above Enforcement Notice.
8. The requirements for swimming pools and associated barriers in Queensland are legislated Chapter 8 of the BA;
9. The subject site is *regulated land* as defined by s231A of the BA, and the swimming pool is a *regulated pool*, as defined by s231B of the BA below:
 - (a) *a swimming pool situated on regulated land; and*
 - (b) *includes the barriers for the pool;*
10. Section 232 of the BA compels an owner of a *regulated pool* to ensure that:
 - (a) *the pool complies with the pool safety standard for the pool; and*
 - (b) *all barriers for the pool are kept in good condition;*
11. The *pool safety standard* is defined under s231D of the BA and comprises:
 - (a) *QDC, part MP3.4; and*
 - (b) *any other standard prescribed under a regulation for ensuring the safety of persons using a regulated pool;*
12. Compliance with the QDC MP3.4 can only be achieved in accordance with s14 of the BA, by:
 - (a) *complying with the relevant acceptable solution for the performance requirement; or*
 - (b) *formulating an alternative solution that complies with the performance requirement or is shown to be at least equivalent to the relevant requirement; or*
 - (c) *a combination of (a) and (b);*
13. Acceptable Solution A1 of the QDC MP3.4 states:

Swimming pools must have a barrier complying with the Standard, subject to the:

 - (a) *modifications to the Standard specified in schedule 1; and*
 - (b) *tolerance limits specified in a guideline for swimming pool barriers made under section 258 of the Building Act 1975;*
14. Under QDC MP3.4, *Standard* means the edition of Australian Standard AS 1926.1 and AS 1926.2 referenced by QDC MP3.4, namely:
 - *Australian Standard 1926.1-2007 (Amndt 1) Swimming Pool Safety - Part 1: Safety barriers for swimming pools; and*
 - *Australian Standard 1926.2-2007 (Amndt 1) Swimming Pool Safety - Part 2: Location of safety barriers for swimming pools;*
15. At the hearing, the Applicants confirmed they had not rectified the non-conforming items listed in the Enforcement Notice or the accompanying Swimming Pool Barrier Inspection Report;

16. As the non-conforming items have not been rectified, the pool does not comply with the Acceptable Solution A1 of the QDC MP3.4 because the barrier does not comply with the Standard or the modifications to the Standard as specified in schedule 1 of the QDC MP3.4;
17. There is no documented evidence of a Building Development Permit having been issued for the pool barrier incorporating an alternative solution that shows compliance or equivalency with the Performance Requirement P1 of the QDC MP3.4;
18. As a result of above, the Applicants are in breach of s232 of the BA because the pool barrier does not comply with the pool safety standard.
19. At the hearing, the Applicants accepted the pool barrier was non-compliant because they had not rectified the issues listed in the Enforcement Notice. However they requested the Committee to make a specific determination about whether the pool gate positioned in the pool barrier along the rear boundary was compliant with the requirements of Acceptable Solution A1 of the QDC MP3.4 given it is atop the revetment wall that provides access from within the pool barrier to the jetty walkway and pontoon.
20. The Committee is of the view that it is unnecessary to make a specific determination on the above issue because the swimming pool barrier does not comply with the Pool Safety Standard for all of the reasons detailed in the Swimming Pool Barrier Inspection Report.

Reasons for the Decision

Council were correct to issue the Enforcement Notice under Section 248 of the BA requiring the owner to rectify the pool safety barrier in order to comply with the Section 232 of the BA.

However, the Committee has determined it was unnecessary to individually list the items subsequent to item SPFC01 on the Enforcement Notice because in order to comply with SPFC01 and s232 of the BA, the subsequent items must also be compliant. That is, it is not possible to satisfy item SPFC01 if any of the other items have not been satisfactorily completed.

It is for the above reason the Committee changes the Enforcement Notice to retain item SPFC01 but deletes all other items except SPFC42.

Further, the Committee changes the wording in item SPFC42 because Council did not give consideration to the fact that the QDC MP3.4 is a performance based document and as such, it is possible to satisfy the Performance Requirements other than by just complying with the Acceptable Solutions, a process outlined in Section 14 of the BA. Therefore, Council did not provide the Applicants with the opportunity to pursue this alternate avenue in achieving compliance with the Pool Safety Standard. The Applicants may wish to seek advice from a Private Building Certifier to assist with this option.

Given the changes to the Enforcement Notice, the Committee has extended the due date for compliance to Friday 21 April 2017 to enable the Applicants to make the necessary rectifications to the swimming pool barrier.

Andrew Parker
Building and Development Committee Chair
Date: 16 March 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