



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	23-062
Appellant:	Matthew Palmer
Respondent:	Stephen Henry, Pool safety inspector
Site address:	10 Columbia Court, Springwood Qld 4127, described as Lot 4 on RP186286

Appeal

Appeal by the owner of a residential swimming pool owner under section 246AO of the *Building Act 1975* (BA) against the decision by a pool safety inspector to give a nonconformity notice (Form 26) for the pool to the owner under section 246AB of the BA.

Date and time of hearing:	9 February 2024 at 10:00am
Place of hearing:	Online - via Teams
Tribunal:	Mr Stuart Smith – Chairperson Ms Kylie Rojahn – Referee
Present:	Matthew Palmer – Appellant Stephen Henry- Respondent

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(a) of the *Planning Act 2016* (PA) upholds the decision of the Respondent to issue the nonconformity notice .

Background

1. The subject site is 10 Columbia Court, Springwood. Located on the subject site is a regulated pool as defined in section 231B of the *Building Act 1975* (BA).
2. The subject site is an independent dwelling with a swimming pool located at the rear of the property. The subject site is a rental property of the Appellant. The relevant tenants and their chosen guests have exclusive use of the subject site.
3. On 1 November 2023, the Respondent, a licensed pool safety inspector, completed a pool safety compliance assessment at the above-mentioned property. On 6 November 2023, the Respondent issued a Form 26 nonconformity notice identifying the following two nonconformities:

a. Nonconformity 1

The pool gate latch is unable to be tested to be locked in the 'open' position (to measure if the gate does/not close and latch from any position under test.

REFERENCE: The (gate) latching device shall not be able to be: (b) able to be locked in the 'open' position (AS1926 Part 1 and 2 QDC MP 3.4 Section 2.5.4.1).

b. Nonconformity 2

P101: Pool Gate(s) do not close when tested at 'Resting on Latch' position.

REFERENCE:

(a) The gate shall close and latch from fully open to resting on the latch, under both of the following conditions: i) Under the natural weight of the gate. ii) With the gate open and after a weight of 25kg has been placed on the top rail or component at a point 100mm from the outer edge of the locking stile of the gate for 30 seconds and then removed.

NOTE: This requirement is intended to indicate whether the automatic closing and latching mechanism is likely to remain effective after the gate has been subject to deflection wither [sic] under its own weight or as the result of children swinging on it.

(b) With the gate closed, the latch and posts of the barrier to which the gate is attached shall be capable of retaining the gate on a closed position when the weight in Item (a)(ii) is placed at the same location and remains on the gate. (...)

4. The Respondent advised that to achieve compliance the following steps were to be undertaken, respectively:

a. Nonconformity 1

SOLUTIONS: Replace ALL non-conforming pool gate(s) self closing latching mechanisms so ALL pool gate(s) are compliant with AS/pool safety regulations and close automatically and stay closed from ALL TESTING POSITIONS (from resting on latch to fully open) and under ALL test conditions.

b. Nonconformity 2

SOLUTION(S): Adjust/replace ALL non-conforming pool gate(s) self closing mechanism, hinges, latching and posts so ALL pool gate(s) are compliant with AS/pool safety regulations and close automatically and stay closed from ALL TESTING POSITIONS (from resting on latch to fully open) and under ALL test conditions.

5. The tribunal members did not undertake a site inspection.

6. The tribunal conducted an online hearing via Microsoft Teams. The Respondent and Appellant were both in attendance.

The Appellant's submissions

7. The Appellant made the following submissions:

- a. The Appellant advised that since the date of issue of the nonconformity notice the gate hinges had been replaced with spring tensioned auto-closing gate hinges.
- b. The Appellant advised he had sought an independent opinion from Logan City Council. The Appellant stated a Council Officer attended his home and deemed the pool fencing to be compliant. The Appellant however did not have any written advice to this effect.
- c. The Appellant advised that the property is a rental property and the existing tenants prefer to access the side area with the use of this lock as it increases security of the property.
- d. The Appellant states that he had performed a number of compliance tests in relation to the second nonconformity and he later submitted these testing results to the tribunal. The Appellant asserted that this demonstrated the locking system is compliant with the gate closing securely from each testing position.
- e. The Appellant advised that he had removed the internal lock mechanism that would have allowed the lock to remain in its 'open position'. On this basis, the Appellant was of the opinion that the lock complies with clause 2.5.4.1(b) of the standard AS1926.1-2007, which requires that the latching device not be able to be locked in the 'open' position.
- f. The Appellant asserted the lock was unusable by children and compliant with section 14 of the BA and as such he considered the lock to be a relevant and acceptable solution for the performance requirement.

The Respondent's submissions

8. The Respondent made the following submissions:
 - a. The concern with the latch was that it may permanently lock in the open position, preventing the gate from self-latching and enabling children to access the pool unaccompanied.
 - b. In his opinion the installed lock mechanism did not comply with the pool safety standard because the access control system was not part of the gate or latching requirements as per the pool safety standard.
 - c. The Respondent was therefore of the opinion that because the pin pad was part of the same assembly as the physical latch or handle system, the lock could not be considered compliant. He further stated that in his opinion there must be a physical latch releasing device that is separate to the access control system for the gate to be compliant.
9. On 26 June 2024, by email from the Registrar, the tribunal drew the parties' attention to the information published by the Queensland Building and Construction Commission titled 'PIN pad and swipe card entry to pool areas' and available at <https://www.youtube.com/watch?v=zFv53tz7ZOM>. The tribunal invited the parties to consider the information and make any submissions they wished to in response.
10. No response was received from the Respondent.
11. On 27 June 2024, the Appellant responded by email to the Registrar, relevantly, as follows:

To operate the latching mechanism from the outside, the pin code is entered which allows the latch to be release. Entering the pin doesn't open the latch! With the pin correctly entered the handle can be used to mechanically open the latch allowing the gate to be opened (...)

Once the latch has been mechanically release[d] the gate can be opened outwards away from the pool. The gate has standard spring loaded self-closing hinges, which returns the gate to the closed position without external force application. The latch mechanism is magnetically captured during closing

preventing the gate from being reopened without mechanical interface i.e. 'To operate the latching mechanism from the outside, the pin code is entered which allows the latch to be release[d]. Entering the pin doesn't open the latch! With the pin correctly entered the handle can be used to mechanically open the latch allowing the gate to be opened. To operate the latching mechanism from the inside, no pin code is required. The inside handle is used to mechanically open the latch allowing the gate to be opened.' **The latching mechanism does not have functionality to 'automatically releases the latch for a few seconds allowing the gate or door to be opened without having to physically use the latch release'.** (...)

Jurisdiction

12. The Tribunal has jurisdiction to hear the appeal under section 229 and Schedule 1, Section 1, Table 3, Item 3(a), of the PA, and section 246AO of the BA, as the appeal is against the nonconformity notice issued by the pool safety inspector and the nonconformity notice included an information notice as required under section 246AB(5) of the BA.

Decision framework

13. Under section 253(2) of the PA, the Appellant must establish the appeal should be upheld. Under section 235(4) of the PA, the Tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against. The Tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the Tribunal or any information provided under section 246 of the PA (pursuant to which the registrar may require information for tribunal proceedings). Under section 249 the Tribunal may inform itself in the way that it considers appropriate and seek the views of any person. The Tribunal is required to decide the appeal in one of the ways mentioned in section 254(2) of the PA.

Materials considered

14. The following materials have been considered:
 - a. Form 10 Notice of appeal lodged by the Appellant dated 1 November 2023
 - b. Written submissions by the Appellant submitted with the Form 10
 - c. The application material including the Form 26: Pool Safety Nonconformity Notice dated 6 November 2023
 - d. Oral submissions made by the Appellant and Respondent during the hearing
 - e. Further email submissions from the Appellant dated 15 February 2024 submitted post hearing per the directions of the Tribunal.
 - f. *The Planning Act 2016* (PA).
 - g. *The Building Act 1975* (BA)
 - h. *The Building Regulation 2021* (BR)
 - i. Queensland Development Code, Mandatory Part 3.4 – Swimming Pool Barriers (QDC MP 3.4)
 - j. Australian Standard 1926.1-2007 Amendment 1, Swimming Pool Safety – Part 1: Safety Barriers for swimming pools as referenced in QDC MP 3.4
 - k. Australian Standard 1926.2-2007 Amendment 1, Swimming Pool Safety – Part 2: Location of safety barriers for swimming pools as referenced in QDC MP 3.4
 - l. QBCC 'Working together pool safety webinar' available at: <https://www.qbcc.qld.gov.au/resources/video/webinar-working-together-pool-safety> and <https://www.youtube.com/watch?v=zFv53tz7ZOM>

Findings of fact

15. The Tribunal makes the following findings of fact:

- a. The subject site at 10 Columbia Crt Springwood. The property is a rental property and requires a pool safety certificate.
- b. The subject site is regulated land as defined under s231A of the BA.
- c. The pool is an existing structure.
- d. The swimming pool barrier subject to the appeal is deemed to be a non-shared, regulated pool as defined under s231A and s231B of the BA.
- e. The swimming pool is defined as an outdoor pool for the purposes of AS1926-2007 Part 1 & 2.
- f. The non-conformity notice relates to compliance requirements relating to the locking mechanism proposed by the Appellant and located at a Class 1a building. The Appellant is seeking the nonconformity notice be set aside based on an acceptable installed solution that complies with part of the QDC and BA.
- g. The first issue raised in the non-conformity notice was the pool gate latch was not compliant at the time of inspection and that the lock was able to be 'locked open' as this mechanism had not yet been removed at the time of the Respondent's inspection.
- h. The Appellant provided a detailed summary of the lock and asserted that the lock with manual keypad access device was compliant. The Appellant stated the installation of this lock increases security to the rear of this property because the lock can be locked.
- i. It is accepted that installation of a compliant pool safety lock that manually releases on the internal side of the gate is not preferred by the Appellant. The Appellant stated that the lock has a pin-code latch release mechanism and the 'lock-open' mechanism had been removed after the date of the Respondent's inspection.
- j. Given that 'lock open' mechanism was not removed at the time of inspection the Respondent was correct to issue a nonconformity because the Respondent was not in a position, at the time of his inspection, to be reasonably satisfied about this aspect.
- k. Pool gate latch mechanisms must comply with clause 2.5.4 (Latching device) of AS1926.1-2007. Clause 2.5.4.2 of AS 1926.1-2007 effectively requires that the underside height of a latch release mechanism that is located on the outside of the barrier must be at least 1500mm above finished ground level and 1400mm above the highest lower horizontal member.

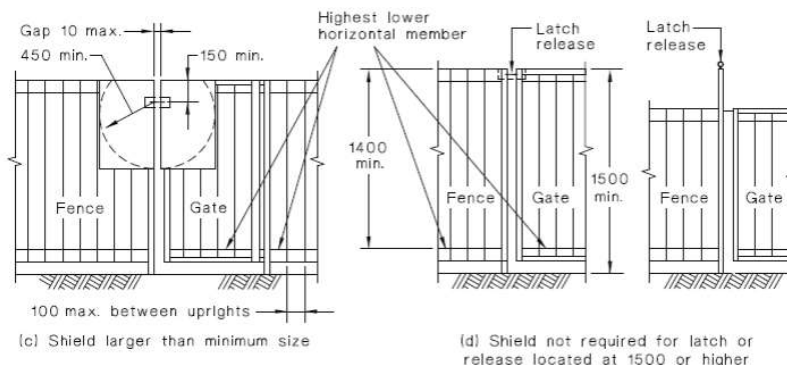


Figure 2.6 Alternative Latch Shielding options for gates of open construction part (d)

- l. The existing pool gate has a pin code access pad. Entering the correct PIN allows the gate latch to be manually released by operating the handle, which resembles a door lever handle in appearance.
- m. The second issue raised in the non-conformity notice related to the failure of the gate self-closing and self-latching. The Appellant provided detailed self-assessment testing results to the Tribunal, which suggested that, following

replacement of the hinges, the gate was now self-closing and self-latching from all open positions including resting on the latch.

- n. The further alleged nonconformity raised by the Respondent in his submissions at the hearing, was not reflected in the nonconformity notice – specifically that the lock allegedly did not comply because the access control system was part of the same assembly as the physical latch. However, the tribunal determined that the fact that the PIN entry pad and the handle that operated the latch, were part of the same assembly, did not result in a nonconformity. The requirement was that in order to open the gate, it was necessary to have to separately (manually) operate the latch release, after entering the PIN, and this requirement was satisfied. Consequently, the Tribunal found that this aspect was not required to be part of the nonconformity notice, because it did not result in nonconformity.
- o. The Tribunal notes that, based on the information received from the Appellant, the modifications carried out by the Appellant after the issue of the nonconformity notice appear to have addressed the nonconformities identified in the nonconformity notice.

Third potential nonconformity identified by the Tribunal

- 16. The information available to the Tribunal shows that the height of the handle for releasing the gate latch is at least 1500mm above finished ground level, but there is insufficient information to show whether the underside of the handle, which is the latch release mechanism, is at least 1400mm above the highest lower horizontal member.
- 17. Evidence available to the tribunal indicates that the lower part of the barrier identified as the highest lower horizontal member (HLHM) rail is approximately 160mm from ground level which in turn will affect the latch release mechanism height of 1400mm (above HLHM). This requires further investigation to confirm compliance.

Reasons for the decision

- 18. The tribunal is satisfied that the two nonconformities identified in the nonconformity notice were items that did not comply with the pool safety standard as at the date of the Respondent's inspection and that the Respondent appropriately issued the nonconformity notice.
- 19. The tribunal notes that the position of the gate latch must have a latch and release mechanism that is located 1500mm or higher above finished ground level to meet Australian Standards for pool safety compliance. This issue can be resolved during any subsequent inspection.
- 20. Therefore, based on all the evidence and submissions, the Tribunal is satisfied that the nonconformity notice should be upheld.

Stuart Smith
Development Tribunal Chair

Date: 28 August 2024

Appeal rights

Schedule 1, Table 2 (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

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