



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	02–10
Appellants:	Douglas Henry and Mary Elizabeth Carrigan
Respondent:	Brisbane City Council (Council)
Co-respondent: (if applicable)	N/A
Site Address:	137 Bonney Avenue, Clayfield and described as Lot 4 on RP40708 – the subject site

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) against an enforcement notice issued by Council requiring the eastern boundary fence to comply with the current pool fencing standards.

Date of hearing:	10:00am, Thursday 18 February 2010
Place of hearing:	The subject site
Committee:	Ray Rooney – Chair
Present:	Douglas Carrigan – Applicant Richard Thorn – Council representative Jamie Robertson – Council representative

Decision:

The Committee, in accordance with section 564 of the SPA **changes** the decision appealed against and decides that the eastern boundary fencing as constructed satisfies the requirements of the legislation applicable at the time of approval of the construction of the pool.

Background

Council records indicate that building approval for the construction of an outdoor swimming pool was granted on 30 April 1973. The eastern boundary fence and other timber fencing was erected to enclose the pool.

In 2003, the northern and western fences were replaced by 1200mm high metal fencing, which included the wall of a Class 10 building.

On 15 December 2007 Council officers carried out an inspection to determine compliance with the pool fencing provisions under the *Building Act 1975* (BA).

An enforcement notice was issued to the appellants on 22 December 2009, stating that the pool fencing around the swimming pool does not comply with fencing standards.

The applicants lodged an appeal against the enforcement notice on 4 January 2010.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Application for appeal/declaration', grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 4 January 2010.
2. The enforcement notice issued on 17 December 2009 to the appellants, requiring the swimming pool fencing to comply with current fencing standards.
3. Verbal submissions by the appellant and Council representatives at the hearing on 18 February 2010.
4. Queensland Pool Fencing Guidelines, March 2008
5. The SPA
6. The BA
7. The *Local Government Act 1936*

Findings of Fact

The Committee makes the following findings of fact:

- The eastern boundary fence was constructed at the time of pool construction, approved on 30 April 1973.
- The fence, approximately 20m long comprises of vertical palings approximately 100mm wide and 19mm deep, spaced between 30mm and 40mm apart, attached to four horizontal rails of varying spacing between 330mm and 680mm apart.
- The top three rails have additional vertical palings on the pool side. The overall height of the fence, measured outside the pool enclosure on the neighbouring land is between 1700mm and 1800mm.
- The shrubs on the neighbouring property adjacent to the fence were planted after the construction of the fence.
- High density shrubbery exists on the pool side of the boundary fence.

Reasons for the Decision

Outdoor swimming pool fencing legislation was introduced in February 1991 under the *Local Government Act 1936*. The legislation gave consideration to fencing requirements for swimming pools built before 1 February 1991 (under standard building by-laws (swimming pool fencing) order 1991, by-law 53.1A (2) and (3)).

Subclause (2) allows the minimum effective perpendicular height of fencing constructed before 1 February 1991, whether lawfully constructed or where there were no local authority pool fencing by-laws, to be 900mm.

Subclause (3) allows:-

- Under (a), Clause 2.6 of AS1926–1986 that apply to the location of horizontal members of fencing;

and

- Under (b), clause 2.7 and 2.9 of AS1926–1986;

- are not to apply to fencing mentioned in Subclause (2) **if the fencing is constructed in a way that is likely to inhibit young children from climbing over, or passing over or through it.**

The Committee is of the opinion that the fence on the eastern boundary between 1700mm and 1800mm above ground on the neighbouring property (outside the pool) satisfies this requirement.

With regard to shrubs adjacent to the fence, the applicant submits these were planted after the fence originally complied. In such circumstances, the pool owner is not required to construct additional fencing, or change the fencing.

Previous legal advice recommends that pool owners notify owners of the adjoining land of their potential liability should access by a young child be gained or assisted by climbing shrubs or other objects adjacent to the fence. In this case, this may also apply to the fence on the southern boundary.

The issue of replacement fencing was raised at the hearing. The BA addresses replacing fencing where it has been demolished or removed, or is in substantial disrepair to the extent that it is impracticable to keep the fencing in good condition. In such cases, the owner must ensure a new fence complies with the fencing standards for the pool, as if the pool were constructed at the time the new fence is required to be constructed.

These circumstances are not applicable in this instance.

Ray Rooney
Building and Development Committee Chair
Date: 10 March 2010

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 Infrastructure and Planning
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