



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number:	3—08—068
Applicant:	Rosemary Ann Kovacs
Assessment Manager:	Sunshine Coast Regional Council
Concurrence Agency: (if applicable)	N/A
Site Address:	19 Mossman Court, Noosa Heads and described as Lot 74 on N21847—the subject site

Appeal

The appeal is against the decision of the Sunshine Coast Regional Council to issue an Enforcement Notice, dated 13 August 2008, in relation to a swimming pool enclosure. The Council reasonably believes that the applicant has failed to comply with a particular matter in the *Building Act 1975* (BA), namely, failure to provide swimming pool fencing which complies with fencing standards for the pool.

Date of hearing:	10am—Tuesday, 21 October 2008
Place of hearing:	Offices of Sunshine Coast Regional Council—9 Pelican Street, Tewantin
Tribunal:	Mr Leo Blumkie—Chair Mr Greg Schonfelder—Member
Present:	Mr Gab Kovacs AM—Applicant's Representative Mr Phil Montague—Sunshine Coast Regional Council Representative Mr Leo Blumkie—Tribunal

Decision:

The Tribunal, in accordance with Section 4.2.34 (2)(b) of the *Integrated Planning Act 1997* (IPA), changes the requirements of the Sunshine Coast Regional Council Enforcement Notice dated 13 August 2008 by:-

Deleting items 1 to 3 under "YOU ARE THEREFORE REQUIRED to" and replacing them with the following:-

1. Upgrade the infill panels between posts and to gates forming part of the enclosure to comply with the strength and rigidity requirement of the Australian Standard 1926 -1986 (AS) - Appendix A; and
2. Complete the above work by the 10 November 2008 to the satisfaction of the Sunshine Coast Regional Council. The date may be extended by the Sunshine Regional Council provided a written request, outlining an acceptable reason for the extension, is submitted to Council before the expiry date.

Background

On 12 December 1970, Noosa Shire Council (the local authority at the time) had Gazetted Local Law No. 42, which applied to swimming pools in the Noosa Shire.

The Local Law had, amongst other things, requirements for the fencing of swimming pools.

On the 1 February 1991 the State Government introduced state-wide pool fencing standards which required the owner of residential land, on which there is an outdoor swimming pool, to construct and maintain pool fencing.

The standard for the design, construction and performance of swimming pool fencing was as contained in AS 1926 -1986.

On the 2 December 1992 the Noosa Shire Council granted approval for an in-ground swimming pool to be erected on the subject property to the then owner. The approval included the following pool enclosure:-

- The external wall of the house and class 10 building formed part of the enclosure.
- No direct access was allowed from the house and Class 10 building to the enclosure.
- A fence and outward opening gate between the house and class 10 building.
- A fence and outward opening gate between the house and rear boundary (canal).
- A fence between the pool and rear boundary (canal).
- Complying side boundary fence from the rear boundary (canal) and class 10 building (The class 10 building was built to the boundary).

The enclosure, amongst other things, consisted of the following:-

- Panels 100 mm above the ground and 1200 mm total height between posts. The panels included vertical bars approximately 100 mm apart, between a bottom and top rail approximately 1100 mm apart.
- The opening gates had similar panels.
- The pool and enclosure were constructed; however Council has no record of any final inspection being carried out on the building work.
- A routine inspection was carried out on the subject property by Council officers on the 14 August 2008.

The inspection report resulting from this inspection stated that:-

*"This enclosure has been determined to be beyond repair....."; and
The pool fence is considered to be beyond repair due to the fence not being constructed in accordance with the fencing standard for the pool. The pool enclosure is required to be fenced in accordance with the fencing standard. A development application for building work approval is required"*

The Council inspecting officer concluded that the panels did not satisfy the strength and rigidity test for openings as outlined in Appendix A of AS 1926 - 1986.

An appeal was lodged with the Registrar of the Building and Development Tribunals on the 16 September 2008.

Material Considered

The material considered in arriving at this decision comprises:

- Noosa Shire Council Pool approval No, 1328/1992 dated 2 December 1992 for the pool.
- 'Form 10 – Appeal Notice' dated 16 September 2008 including grounds for appeal and correspondence accompanying the appeal.
- Enforcement Notice dated 13 August 2008.

- Verbal submissions from the applicant's representative at the hearing.
- Written submission from the applicant.
- Verbal submissions from Council representative at the hearing.
- Pool fencing guidelines - third edition March 2008.
- The IPA.
- The BA.
- The Building Regulation 2006.
- AS 1926 – 1986.
- AS 2818 – 1986.

Findings of Fact

The Tribunal makes the following findings of fact:

The property has an in-ground swimming pool, which is fenced as follows:-

- The external wall of the house and class 10 building form part of the enclosure (Both parties agreed the roller door to the class 10 building was not operable due to corrosion) No direct access exists from the house or Class 10 building to the enclosure.
- A fence and outward opening gate exists between the house and class 10 building.
- A fence and outward opening gate exists between the house and rear boundary (canal).
- A fence exists between the pool and rear boundary (canal)
- A complying side boundary fence exists from the rear boundary (canal) to the class 10 building. (The class 10 building was built to the side boundary.

The pool enclosure was required to comply with the State Government pool fencing standards as introduced in February 1991.

The standard for the design, construction and performance of swimming pool fencing was as contained in AS 1926 -1986.

After considering the evidence presented by the Council, the owner accepted that the panels did not satisfy the strength and rigidity test AS 1926 -1986.

The panels did not satisfy the strength and rigidity test of the standard.

Reasons for the Decision

After considering the circumstances and history regarding the non-complying fence to the pool, the Tribunal concludes that :-

- As no final inspection was carried out on the pool at the time of completion, it was unable to determine whether the panels even complied with the standard at the time of completion.
- The panels were made from aluminium and the Council officer indicated there was little evidence of corrosion at the time of inspection in 2008.
- It was therefore, highly likely, the panels never complied with the standard even from new.
- The enclosure was not beyond repair as it was possible to upgrade the panels (with the additionally stiffening to the vertical bars in a number of ways) so that they would satisfy the standard.
- The non-complying enclosure is approximately 30% of the total enclosure and after taking into account the detail of the non-compliance, it is difficult to determine if the enclosure is in substantial disrepair.

- The owner should be given the opportunity to modify the non-complying panels and gates so that they comply with the standard.
- It was not necessary to require a development application to upgrade the panels.
- After discussion, the Council representative agreed as follows:-
 - a) the panels could be upgraded to comply with the standard
 - b) the enclosure was not beyond repair
 - c) the enclosure was not in substantial disrepair
 - d) A development application was not required.
- As the owner currently lives in Melbourne, the Council representative agreed to assist the owner by nominating suitable contractors to provide options with quotes to the owner by the 27 October 2008 on methods of upgrading the panels and gates.
- The Council representative considered it possible to have the building work of upgrading both the panels and gates undertaken by 10 November 2008.
- The owner agreed to the above dates, subject to an extension of time being available, should a legitimate reason occurred in the performance of the work eg material delivery delay, wet weather etc.
- Both parties agreed any extension of time should be requested in writing to the Council before the expiry date.
- The Council representative agreed to inspect the completed upgrade and assist the owner where possible.

Leo Blumkie
Building and Development Tribunal Chair
Date: 22 October 2008

Appeal Rights

Section 4.1.37 of the *Integrated Planning Act 1997* provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Tribunal or
- (b) that the Tribunal 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 Tribunal's decision is given to the party.

Enquiries

All correspondence should be addressed to:

The Registrar of Building and Development Tribunals
Building Codes Queensland
Department of Infrastructure and Planning
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248