



**Building and Development Tribunals**  
**Queensland Government**

Department of Local Government, Planning,  
Sport and Recreation

**APPEAL**

**File No. 3-07-048**

*Integrated Planning Act 1997*

**BUILDING AND DEVELOPMENT TRIBUNAL - DECISION**

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**Assessment Manager:** Maroochy Shire Council

**Site Address:** *withheld*—"the subject site"

**Applicant:** *withheld*

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**Nature of Appeal**

Appeal under Chapter 9 Section 250 of the *Building Act 1975* against the Maroochy Shire Council's decision to issue an Enforcement Notice (No. 07SPE0038 dated 28 August 2007) requiring a swimming pool to be fenced to current standards, on "the subject site".

The Enforcement Notice requires four pool fencing related items to be carried out by the owner. The owner advises the Tribunal that only the swing of the pool gate at the laundry door is subject of the appeal. Accordingly, the Tribunal will address this item only.

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**Date and Place of Hearing:** 11.15 am Thursday 20 September 2007  
by teleconference on Level 17 Mineral House,  
41 George Street, Brisbane

**Tribunal:** Raymond W Rooney – Chairperson  
Mark Cassidy – General Referee

**Participants:** Applicant/Owner  
A. Schofield – Maroochy Shire Council Representative  
G. Doyle – Maroochy Shire Council Representative  
S. Tucker – Maroochy Shire Council Representative

**Decision**

Taking into consideration the relevant facts and circumstances, the Tribunal determines that the Maroochy Shire Council's decision, contained in its Enforcement Notice No. 07SPE0038 dated 28 August 2007, that the pool fencing is non complaint requiring compliance with the current *Building Act 1975*, namely AS1926.1–1993, within 20 business days of the Notice, be **changed** to allow the gate to remain as existing.

## **Background**

- The pool was approved on 12 March 1990 (BA90/0274) for the previous owners;
- At the time of construction, the pool was not required to be fenced under Maroochy Shire Council's By-Law – Chapter 56 as the land was zoned Rural B (Land Use – residential). The area of the land was 10.29 ha.
- State swimming pool legislation was introduced in February 1991 and Maroochy Shire Council amended Chapter 56 on 19 February 1991 to require pool fencing in accordance with the prescribed state standards for fencing, including pools on rural land.
- The applicant purchased the property on 24 November 2000, and erected fencing about September 2002. The area of land had been reconfigured to 4.023 ha. No 'exemption' was applied for.
- The fencing was erected without the required approval from Council, and consequently no final inspection was undertaken;
- Maroochy Shire Council officers subsequently carried out an inspection of the fencing on 29 May 2007 under their Schedule of Inspection Program.
- Council issued an advisory letter on 20 June 2007 advising the rectification work required to be undertaken;
- Council re-inspected the fencing on 17 July 2007 to find the work required to be rectified had not been carried out;
- Council's letter of 22 August 2007 outlines previous inspections and attached an Enforcement Notice explaining the necessary action to be taken within 20 business days.

## **Material Considered**

1. 'Form 10 – Notice of Appeal' to the Building and Development Tribunals dated 5 September 2007 setting out grounds of appeal and the enclosed DVD submission;
2. Council's letter dated 22 August 2007 attaching Enforcement Notice (No. 07SPE0038 dated 28 August 2007);
3. Verbal submissions from the applicant explaining reasons for appeal;
4. Verbal submission from S. Tucker and A. Schofield explaining the reasons Council issued an Enforcement Notice and further clarifying background information;
5. The *Building Act 1975*;
6. The *Integrated Planning Act 1997*;
7. The *Local Government Act 1936 – Section 49H* – Control and regulation of swimming pool fencing; and
8. *Local Government Act (Swimming Pool Fencing) Amendment Act 1991* – Act No. 49 of 1991, an act to amend the *Local Government Act 1936*.

## **Findings of Fact**

1. The swimming pool was approved for construction for the previous owners (Approval No: 900274) on 12 March 1990;
2. The applicant erected pool fencing about September 2002. No fencing was required under The Local Laws;
3. No final inspection of the completed fencing was carried out;

4. The applicant purchased the property on 24 November 2000;
5. Council inspected the pool and fencing on 29 May 2007 to determine compliance;
6. Council issued an Advisory Letter on 20 June 2007 advising the rectification work required to be undertaken;
7. Council reinspected the pool and fencing on 17 July 2007; and
8. Council issued an Enforcement Notice for non compliant pool fencing on 22 August 2007.

### **Reasons for the Decision**

1. Although the responsibility to fence an outdoor swimming pool rests with the owner, all fencing must be approved by the local authority prior to construction to ensure compliance with the prescribed standards;
2. In this instance, the prescribed standards for fencing erected in 2002 was contained in the *Standard Building Regulation 1993* – Part 5. Section 61 states “the prescribed standard applying immediately before the commencement of Part 5”. These were contained under Part 4 B of the *Building Act 1975* Section 30 H (2) referencing Standard Building Law clause 11.4 – Standard for fencing as AS1926 – 1986 (except clause 2.3) and clause 11.5 – Standards for openings as AS2818 – 1986 (unless a variation is granted). Subclause (6) of 11.5 allowed a local authority to permit protected access doors in existing situations to open toward the pool if satisfied that it is impractical or inappropriate for the door to open inwards to the building. “Guidelines for the interpretation of Swimming Pool Fencing requirements” specifically addresses this situation.
3. As no approval was given at the time the fencing was erected in 2002, the Act requires that the current Standards be met.
4. The current standards are prescribed in the *Building Regulation 2006* under Part 4 as; AS1926.1 – 1993 Swimming Pool Safety, Part 1 – Fencing for swimming pools; and AS1926.2 – 1995 Swimming Pool Safety, Part 2 – Location of fencing for private swimming pools. The regulation excludes clause 2.14 – Child Resistant Doorset from AS1926.1 – 1993 and the Act excludes clause 1.4.4 Option C – permitting access from the building to the pool area, from AS1926.2 – 1995, allowing local government to only consider access for disabled persons living on the property.
5. In this case, the security grill prevents the pool gate from being opened from inside the laundry. Hence, access from the building to the pool area is not possible and the legislation is satisfied.
6. There are three other complying pool gates allowing entry to the pool and the gate to the laundry door can only be used when exiting the pool.
7. The Tribunal is of the opinion that the current arrangement of doors and gate in the laundry wall do not compromise the safety of young children.

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**Mr Ray Rooney**  
**Building and Development Tribunal**  
**Chairperson**  
**Date: 5 October 2007**

## **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  
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