



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number: 65 - 10

Applicant: Petra Stanton

Assessment Manager: Brisbane City Council

Concurrence Agency: N/A

Site Address: 36 Hillside Crescent, Hamilton described as Lot 2 on RP 85689 — the subject site.

Appeal

Appeal under section 541 of the *Sustainable Planning Act 2009* (SPA) against the decision of the Brisbane City Council to issue an enforcement notice, namely for pool fencing, as Brisbane City Council reasonably believes that the pool fence does not comply with fencing standards.

Date of hearing: 10:00am – Tuesday 14 September 2010

Place of hearing: 36 Hillside Crescent, Hamilton

Committee: Mr Leo Blumkie – Chair

Present: Mrs Petra Stanton – Applicant
Mr Mark Stanton – Applicant
Mr Matthew Wighton – Brisbane City Council
Mr Jamie Robertson - Brisbane City Council
Mr Anthony Fairchild - Brisbane City Council
Mr Leo Blumkie - Chair

Decision

The Committee, in accordance with section 564 (2) (a) of the SPA confirms the decision appealed against and directs the BCC to withdraw the Enforcement Notice (20 August 2010) and reissue the Enforcement Notice with the date of this decision.

Background

The site is located at 36 Hillside Crescent, Hamilton and because of the slope of the site has a “dog leg” access from Hillside Crescent. The site also has a street frontage to Dickson Terrace, however there is no usable access as this street is some 8 metres above the excavated area for the house and pool.

It is a very steep site which has been substantially excavated for construction of a Class 1 building and in-ground swimming pool. The resulting 8 metre embankment, which has an approximate 15 degree slope, is heavily planted with trees and shrubs.

Council officers advised that BCC (as a result of complaints from residents) is currently preparing to erect a fence along the Dickson Terrace Boundary to provide a safety barrier for pedestrians etc.

The subject pool is located between the house and Western side boundary. The Western side boundary is steep ie running down from Dickson Terrace to the driveway of the subject property. This boundary has a mixture of timber and brick fencing of varying heights erected approximately on the boundary.

According to BCC records, approval was given on 13 May 1980 for the construction of an outdoor/in-ground swimming pool.

Council was unable to produce any documentation on the approval including any pool fencing details.

The current owner bought the property in January 1998 and at the time obtained a “swimming pool fence compliance advice” from the BCC.

The advice is dated 15 January 1998 and states the perimeter fencing, gates etc are satisfactory.

Council issued an Enforcement Notice on the 20 August 2010 advising that the pool fencing does not comply with the “Fencing Standards”, for the following reasons:-

- (a) *There is a section of unsecured sloping ground to the Western side of the swimming pool providing potential unrestricted access from Dickson Terrace to the swimming pool, which does not meet the required height for sloping ground to be utilised as pool fencing.*
- (b) *The pool gate is not self closing or latching.*
- (c) *There are gaps greater than 100mm under the Southern and North East corner pool fences,*
- (d) *The construction of the North East corner fencing does not comply due to the fencing height being staggered and the rails not being the correct width apart,*
- (e) *There are climbable objects within the inside and outside of the North Eastern corner climbable quadrant radius.*
- (f) *Vegetation has grown over the pool fence within the North East corner and has lessened the height of the fence.*

An appeal was lodged with the Building and Development Committee Registry on 27 August 2010.

The Registrar advised Council on 1 September 2010 that an appeal had been lodged in relation to the Enforcement Notice.

On 3 September 2010 the Building and Development Committee Chairperson advised Council and the applicant of the date, time and place for the hearing.

At the request of the applicant the date of the hearing was changed to 14 September 2010 and both the applicant and Council were advised by e’mail of the change, on 9 September 2010.

It would appear that the applicant, since receiving the enforcement notice has undertaken some maintenance work on the fencing including reduction of the gap under the fence to 100mm and removal of vegetation over the pool fence to the North East corner. Further work is still required to make the fence

comply with the Fencing Standards.

Material Considered

The material considered in arriving at this decision comprises:-

1. Form 10 – Notice of Appeal, correspondence accompanying the appeal lodged with the Registrar on 27 August 2010.
2. The Enforcement Notice issued by Council, as the assessment manager, dated 20 August 2010.
3. Verbal submissions from the applicants at the hearing.
4. Verbal submissions from the Council representatives at the hearing.
5. *Building Act 1975*.
6. *Building Regulation 2006*.
7. *Sustainable Planning Act 2009*
8. Building Code of Australia.
9. Australian Standards “Fences and Gates for private swimming pools”
10. “Pool Fencing Guidelines” produced by Local Government and Planning.

Findings of Fact

The Committee makes the following findings of fact:-

- The site is very steep and has been excavated to establish a level platform for the pool and house.
- An in-ground/outdoor swimming pool is erected on the site.
- The BCC granted approval for an outdoor pool on 13 May 1980
- No approval documents are available.
- It is not known to what extent pool fencing was included in the original approval.
- It would appear that fencing was included for the Eastern and Southern sides of the pool which extended to the Western boundary and the embankment to the Northern side of the pool.
- It would appear that the embankments to the Northern and Western boundary were, at the time of approval, considered an acceptable barrier and no additional fencing was required.
- The fencing standard applicable at the time of approval was “Australian Standard 1926-1979”
- This standard, unlike more recent standards, makes no reference to sloping banks as a satisfactory barrier.
- The applicant obtained satisfactory compliance advice for the pool fencing on 15 January 1998 at the time of purchase of the property.
- This advice supports the original approval assumption i.e. that the sloping banks to the North and Western sides of the pool were at the time considered acceptable.
- It is not known what changes may have occurred to the banks, fencing and undergrowth since the original approval.
- Under the pool fencing standards the embankment and Western boundary fence would not be considered an acceptable pool fence barrier.
- The Dickson Terrace embankment would most likely comply as an acceptable barrier.

- It may be possible for the Eastern pool fence to extend into the Dickson Terrace embankment and satisfy the pool fencing standards.

Reasons for the Decision

Items (b) to (f) identified in the Enforcement Notice as not being compliant with the fencing standards are, in my opinion, correct statements.

In relation to Item (a) in the Enforcement Notice consideration needs to be given to the following matters:-

Even though the sloping ground to the Western side of the pool may have been considered acceptable in the original approval, it is not known what changes have occurred since 1980.

In my opinion, the current sloping ground complete with timber/brick fence is not a complying barrier under the pool fencing standards.

It would not be in the interest of child safety to accept the embankment/boundary fence as a satisfactory barrier, even though the original approval may not have required a complying fence on the Western side of the pool.

Options are available ie running the Eastern pool fence into the Dickson Terrace embankment; however this will require stepping of the fence and satisfying the 1200 mm clear span. Also it may result in debate as to whether projections/undergrowth, forming part of the embankment, provide climbable hand and toe holds.

In so far as providing isolation fencing on the subject site, AS 1926-1979 (the applicable standard at the time), has the same requirements for the fencing as the current pool fencing standards.

The construction of the additional fencing is assessable development and will require a Development Permit.

The date of the Enforcement Notice should be changed to the date of this decision.

Leo Blumkie
Building and Development Committee Chair
Date: 22 September 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
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248