



## Building and Development Tribunals — Decision

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### *Integrated Planning Act 1997*

**Appeal Number:** 3—08—064  
**Applicant:** *Withdrawn*  
**Assessment Manager:** Sunshine Coast Regional Council  
**Concurrence Agency:** N/A  
(if applicable)  
**Site Address:** *Withdrawn*—the subject site

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### **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.

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**Date of hearing:** 2pm—Wednesday, 1 October 2008  
**Place of hearing:** The subject site  
**Tribunal:** Mr Leo Blumkie — Chair  
Mr Greg Schonfelder — Member  
**Present:** *Withdrawn* — Applicant/Owner  
*Withdrawn* — Observer  
*Withdrawn* — Adviser to Applicant  
Mr Phil Montague — Sunshine Coast Regional Council Representative  
Mr Don Grehan — Sunshine Coast Regional Council Representative  
Mr Leo Blumkie — Chair

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### **Decision:**

The Tribunal, in accordance with section 4.2.34 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 4 under "YOU ARE THEREFORE REQUIRED to" and replacing them with the following items:-

1. Maintain the temporary fencing until all the matters referred to in the Development Approval (under item 2 below) are completed.
2. Obtain a Development Approval for a pool enclosure by 5 pm on 14 November 2008 pursuant to Section 237 of the BA which satisfies the following:-
  - (a) Canal side enclosure. This fence shall be in accordance with AS 1926.1 - 1993. The height shall be measured above the top of the existing revetment wall. The owner is responsible to ensure that the beach sand level is always below the top of the revetment wall. (Council records to be endorsed accordingly)
  - (b) The existing sliding doors (4 off) which provide direct access to the pool and window (1 off) to the existing house which forms part of the pool enclosure are to satisfy clauses 2.13 and 2.14 of the AS 1926.1 - 1993.
  - (c) The remainder of the enclosure is to satisfy AS 1926.1 - 1993.
3. Complete the work required under the Development Approval within the times stipulated in the Legislation.

## **Background**

The subject site backs onto a permanent watercourse namely a canal within the Noosa Sound canal development. The rear boundary includes the revetment wall built as part of the canal development.

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 19 December 1979 the Noosa Shire Council granted approval for an in-ground swimming pool to be erected on the subject property of the then owner.

The approved plan indicated the following:-

- the existing house (wall doors and windows) formed part of the enclosure;
- proposed fencing from the house to the rear boundary, namely the canal, on both sides of the house; and
- no fence between the pool and the canal.

Both parties agreed, from the evidence available at the hearing, that :-

- no fence was required on the canal side of the pool at the time of the original approval.
- it was possible under Local Law 42 section 5 (iii) that the Health Inspector could have waived the need for a fence to the pool on the canal boundary.

On the 5 August 1987 the Noosa Shire Council issued the original owner with a Compliance Notice to fence the pool in accordance with Council's By-Laws and AS 1926. The notice made specific reference to the need to fence the pool from the 'canal beach'.

The Council representatives were unable to explain:-

- why this notice was issued (some 9 years after the original approval was given)?
- why the canal side of the pool now needed to have a complying fence, and
- under what legislative authority the notice was given?

The Council records indicate that apparently the owner, after numerous extensions of time, agreed to fence the canal side of the pool. The fence was subsequently inspected and approved on the 16 February 1988.

The property changed ownership in April 1994.

A Statutory Declaration has been provided by the new joint owners stating that at the time of purchase no fence existed between the canal and the property.

Hence, between February 1988 and April 1994, the fence between the canal and pool has been removed.

Both parties agreed it was possible the timber deck surrounding the in-ground pool had been modified/renewed/updated as part of maintenance and in doing so the pool fence to the canal had, inadvertently, been made ineffective.

It was noted the existing deck ranged from approximately 600 mm to 1000 mm above the revetment wall.

On the 21 December 1995 approval was given to the new owners to extend the house towards the canal. The approval included modifications to the pool fencing enclosure as follows:-

- delete the pool fence from the house to the rear boundary on the right hand side.
- provide a new complying fence between the extension and the side boundary fence.
- no fence was indicated on the canal side of the pool. This could mean a 'tasset approval' was given not to require a fence on the canal side.

The BA, current at the time of approval (21 December 1995) contained an exemption clause for waterfront land namely:-

*Exemptions – waterfront land*

*300.(1) The owner of land*

*(a) adjoining a watercourse; and*

*(b) where there is an existing swimming pool or a new swimming pool is constructed or installed;*

*is required to construct fencing to isolate the swimming pool from the water course only if the local government decides the fencing is necessary to inhibit access by young children to the swimming pool.*

It was not clear whether the application to extend the house and modify the pool enclosure constituted an application under section 30N (1) of the BA to delete the need to fence the land adjoining the watercourse.

Council representatives advised that:-

- they were aware of eight other situations where exemptions had been granted and all such exemptions had been conditioned to apply only to the owner of the property at the time.
- All properties with a pool between the house and canal boundary within the old Noosa Shire area have a complying pool fence between the canal boundary and pool.

The Council representatives advised that, if the Tribunal concluded that the approval on 21 December 1995 was in fact an exempt not to fence the canal, Council would consider revoking the exemption under 30s.(1) of the BA applicable at the time.

Temporary isolation fencing has been installed.

An appeal was lodged with the Registrar of the Building and Development Tribunals on the 9 September 2008.

## **Material Considered**

The material considered in arriving at this decision comprises:-

1. Noosa Shire Council Pool approval No 706/79 dated 19 December 1979 for the pool.
2. 'Form 10 – Appeal Notice', dated 9 September 2008 including grounds for appeal and correspondence accompanying the appeal.
3. Enforcement Notice dated 13 August 2008.
4. Noosa Shire Council approval to extend the house and modify the pool fencing dated 21 December 1995.
5. Verbal submissions from the applicant and the observer at the hearing.
6. Written submission from the applicant.
7. Verbal submissions from Council representatives at the hearing.
8. Written submission from Council, faxed to the Registrar 30 September 2008.
9. Inspection of the subject site.
10. Guidelines for the Interpretation of swimming pool fencing requirements.
11. Pool fencing guidelines third edition March 2008.
12. The *Building Act 1975*.
13. The Building Regulation 2006.
14. Australian Standard AS 1926.1 – 1993.
15. The IPA.

## **Findings of Fact**

The Tribunal makes the following findings of fact:-

The subject property backs onto a permanent watercourse (canal), which is generally greater than 300 mm deep (observed on site).

The property has an in-ground pool with a surrounding timber deck between the house and the canal boundary.

The construction between the deck and the ground level (beach) does not constitute a complying barrier between the canal and the pool.

The sand level height of the canal varies with tidal movement. Generally sand is eroded, however some owners pay to have the canal (beach) built up with sand when the need arises.

The canal (beach) level is generally never above the top of the revetment wall.

The direct access between the house and pool as approved in 1979 was permitted under the legislation at the time, subject to specific conditions being satisfied.

However, with the extension approved in 1995 additional doors to the bedroom gave direct access to the pool enclosure. The Standard Building Law in 1993 (applicable at the time) did not permit such direct access, however clause 63(1) gave power to local government to grant exemption for such doors subject to specific conditions.

It would appear that the Noosa Shire Council in granting their approval in 1995 gave exemption (tasset approval) for additional doors to have direct access to the pool enclosure.

The swimming pool approval dated 19 December 1979 most likely did not require a fence between the pool and the watercourse (canal).

The type and location of fence between the canal and pool inspected by Council on 16 February 1988 was not known. May be it was an extension of the revetment wall and satisfied the pool fencing legislation at the time.

The approval in 1995 to extend the house and modify the pool fencing did not include fencing to the canal side of the pool.

The pool fencing legislation applicable at the time of approval included power to grant exemptions (for pools fronting canals, watercourses etc) to the requirement to fence the canal, watercourse boundary.

From the evidence available, it is unlikely that an exemption was considered.

This exemption power was subsequently removed from the Legislation in late 2003.

### **Reasons for the Decision**

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

- the fence between the pool and canal should not be considered as being in substantial disrepair, as all recent owners were not aware the fence was required as part of the pool enclosure;
- since the doors and window are the same size and appear not to have been modified from the approval given on 21 December 1995, then the adjustments required to make them compliant should be considered as minor maintenance;
- the pool enclosure is therefore not in substantial disrepair and should be made to comply with current standards.

### **A – Fencing the canal side of the pool**

1. Even though the original pool approval may not have required a complying fence between canal and pool, the Noosa Shire Council appear to have been successful in having the original owner install a complying fence. Records indicate a complying fence was inspected on 16 February 2008.
2. It would appear that no exemption was granted to the new owners not to fence the watercourse as part of the approval granted by Noosa Shire Council on 21 December 1995.
3. Council representatives advised that had an exemption been granted not to fence the canal, Council would have used it's power under section 30S(1) of the Building Act and revoked the exemption.
4. All canal frontage properties with a pool between the house and canal boundary, within the Old Noosa Shire area, have a complying pool fence between the canal boundary and pool.
5. There is insufficient evidence available to conclude that the canal side of the pool is not required to have complying fencing.

NOTE: The owner agreed to make application for operational works approval to allow the gate in the canal fence to open towards the canal, ie onto Crown land. Council representatives agreed to give written support for this application.

## **B – Direct access from the house**

1. The legislation applicable at the time the pool was approved in 1979 allowed direct access from the house to the pool enclosure subject to specific conditions being satisfied.
2. The approval granted in 1995 granted additional direct access from the house to the pool (via the new bedroom). This was not permitted under the SBL at the time, however, the local authority did have power at the time to grant exemption subject to conditions. It would appear that the local authority at the time granted exemption of gave tasset approval for the new doors.
3. It would appear that at the time of inspection by Council on 11 September 2008 the self closing mechanism and latching did not meet the requirements of the legislation at the time of approval.
4. Maintenance was carried out on the self closing mechanism and latching. They now satisfy the requirements at the time of approval.
5. In the opinion of the Tribunal since the doors and window are the same size and appear not to have been modified from the approval given on 21 December 1995, then the work to make them compliant should be considered as minor maintenance.

## **C – Remainder of the pool enclosure**

The remainder of the enclosure should comply with the requirements applicable at the time of approval on 21 December 1995 namely AS 1926.1 - 1993

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**Mr L F Blumkie**  
**Building and Development Tribunal Chair**  
**Date: 13 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**