



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number: 74-11

Applicant: Body Corporate Lagoons at Port CTS-35761

Assessment Manager: Cairns Regional Council (Council)

Concurrence Agency: Not Applicable
(if applicable)

Site Address: 2-16 Langley Road Port Douglas Q 4877, Lot 0 on SP 195686 – the subject site.

Appeal

Appeal under Section 532(1) of the *Sustainable Planning Act 2009* (SPA) against the decision of Cairns Regional Council to give an Information Notice refusing an application for exemption - compliance impracticable in relation to swimming pools on the subject site.

Date of hearing: 9.30am – Tuesday 11 October 2011.

Place of hearing: 2-16 Langley Road Port Douglas Q 4877.

Committee: Don Grehan – Chair

Present: Murray Worthington – Applicant’s Representative.
Bob Playh – Applicant’s Representative.
John Evans – Council’s Representative.
Scott Dillon – Council’s Representative.

Decision:

The Building and Development Dispute Resolution Committee (“the Committee”), in accordance with Section 564(2)(a) of the SPA, **confirms** the decision of Council to give an Information Notice refusing an application for exemption - compliance impracticable in relation to the swimming pools on the subject site.

Background

A resort complex constructed around four common lagoon style swimming pools situated on the subject site.

A primary design feature of the resort is a private “swim out” access from the ground floor units, to the adjacent pools from private patio areas to the rear of the units. These patio areas are typically furnished with sun lounges, tables and chair settings which can be located either side of an aluminium pool fence and gate that effectively divide the patio from the pool enclosure.

The Applicant, while having obtained a Form 23 Pool Safety Certificate in relation to the pools on the subject site, considers that keeping the barriers in good (compliant) condition is unachievable given that Queensland Development Code (QDC) MP3.4 – Swimming Pool Barriers imposes non-climbable zones that severely limit the usability of the patio areas and compromise the integrity of the resorts design. Additionally, the Applicant considers that the non-climbable zones cannot wholly be maintained when the actions of occupants of the units cannot be controlled.

Accordingly, an application was made to Council for an exemption from compliance with the pool safety standard on the grounds of impracticality in accordance with Section 245 of the *Building Act 1975*.

Having considered the situation, Council refused the application in the belief that, given the premises is accessible to young children, the risk associated granting and exemption is too great.

The Applicant dissatisfied with Council's refusal, appealed the decision.

Material Considered

The material considered in arriving at this decision comprises:

- Form 10 – Appeal Notice and Applicant's correspondence accompanying the appeal lodged with the Registrar on the 13 September 2011, inclusive.
- Council's Exemption Application Decision Notice, Ref No. 3218458, dated the 22 August 2011.
- The Applicant's Form 28, “Application for Pool Safety Standard Exemption” and supporting documentation, as lodged with Council, dated 16 June 2011 and 22 June 2011 respectively.
- Form 26 Pool Safety Non Conformity Notice issued by D.Potgieter, Pool Safety Inspector Licence No. 100615 dated 15 April 2011.
- Form 23 Pool Safety Certificate (Ref No. 100615000145) issued by D.Potgieter, Pool Safety Inspector, Licence No.100615 dated 6 October 2011.
- Verbal submissions from the Applicant's representative at the hearing.
- Verbal submissions from Council's representative at the hearing.
- The *Building Act 1975* (BA).
- The *Sustainable Planning Act 2009* (SPA).
- Queensland Development Code (QDC) MP3.4 – Swimming Pool Barriers.
- The Standard Building Regulation 1993 (SBR).

Findings of Fact

The Committee makes the following findings of fact:

- A resort complex known as Oaks Lagoons is situated on the subject site.
- The resort is constructed around four common lagoon style swimming pools and a primary facet of the complex is the “swim out” feature from the patio areas of the ground floor units to the adjacent pool.
- The “swim out” feature consists of the ability for occupants on the ground floor units are able to gain access to the adjacent pool via a pool gate through a swimming pool barrier from the private patio areas to the rear of the ground floor units.
- The patio areas are typically furnished with sun lounges, tables and chair settings which can be located either side of aluminium pool fence and gate that effectively divide the patio from the pool enclosure.
- The Appellant confirms that the “swim out” feature was an integral part of the original resort design.
- The resort complex, inclusive of the lagoon pool, was constructed circa 2005 and a Certificate of Classification was issued by the former Douglas Shire Council on the 28 July 2006 which confirms the resort consists of Class 2 Buildings.
- At the time of construction the fencing standards for the lagoon pool, as defined by the SBR were:
 - (a) the standard for the design, building and performance of swimming pool fencing in AS 1926.1-1993, Swimming pool safety part 1: Fencing for swimming pools, other than clause 2.14 of the standard; and
 - (b) the standard for the location of fencing contained in AS 1926.2-1995, Swimming pool safety part 2: Location of fencing for private swimming pools, other than clause 1.4.4 of the standard.
- AS 1926.1-1993, Swimming pool safety part 1: Fencing for swimming pools imposed a 1200mm arc from the top of the pool fence outwards in which climbable objects were not permitted, similarly, an area of 300mm free of toeholds or climbing aids was required on the inside of the pool enclosure where access through an open style balustrade was available.
- Following legislative changes of the 1 December 2010:
 - (a) Section 231A of the BA clarifies that, the subject site is regulated land, the letting of rooms on the subject site constitutes an accommodation agreement and the pools on the subject site are shared pools.
 - (b) Section 231B of the BA clarifies that the swimming pools on the subject site are regulated pools.
 - (c) Section 232 of the BA clarifies that the owner of a regulated pool must ensure the pool complies with the pool safety standard for the pool.
 - (d) Section 231D of the BA confirms that the Pool Safety Standard for the swimming pools on the subject site is MP 3.4 of the Queensland Development Code including Australians Standards AS 1926.1 – 2007 and A.S 1926.2-2007.

- QDC MP3.4 imposes a 900mm non climbable zone and a 1200mm additional non-climbable zone from the top of the pool fence outwards in which climbable objects are not permitted similarly, an area of 300mm must be free of footholds or climbing aids on the inside of the pool enclosure where access through an open style balustrade is available.
- On the 6 October 2011, a Form 23 Pool Safety Certificate (Ref No. 100615000145), was lodged with the Pool Safety Council covering the swimming pools located on the subject site.
- Irrespective of the existence of the Form 23 Pool Safety Certificate (Ref No. 100615000145), the Applicant believes that keeping the barriers for the pool in good (compliant) condition as required by Section 232 of the BA is unachievable given that:
 - (a) QDC MP3.4 imposes non-climbable zones (both internal and external to the pool enclosure) that severely limit the usability of patio areas; and
 - (b) They (the appellant) cannot control of the actions of the occupants of the units in respect to the rearrangement of patio furniture and sun lounges to maintaining the non-climbable zones imposed by QDC MP3.4.

Additionally, the Applicant considers the restrictions imposed by the non climbable zones compromises the integrity of the original design of the resort (as approved by the Building Section of the former Douglas Shire). The removal of patio furniture and sun lounges from the private patio areas would make the resort a less desirable holiday option that would equate to a negative follow on effect in regard to occupancy rates, investment returns and incomes.

Reasons for the Decision

- The Committee is not satisfied that the granting of an exemption that effectively permits climbable objects to be located within the non-climbable zones from the swimming pool barrier fulfils the stated purpose of QDC MP 3.4, namely: "To safeguard young children from drowning or injury in regulated pools".
- The Committee is not satisfied that the non-climbable zones imposed by QDC MP3.4 will compromise the integrity of the original design of the resort given that the legislative changes introduced under MP3.4 are less than that required at the time of the initial design and approval of the complex (i.e. a 900mm non-climbable zone as opposed an equivalent 1200mm clear arc from the top of the pool fence).
- The Committee is satisfied that the removal of patio furniture and sun lounges from the private patio areas is not impractical given that the issues of their location around the pool enclosure and their potential for relocation by the occupants and was likely problematic and non-compliant prior to the legislative changes introduced in December 2010.
- The Committee is satisfied that sufficient alternate options exist, such as alteration to the location of the pool enclosure (corralling of units doors etc.) that would enable not only the maintenance of the "swim out" feature but also the provision and maintenance of a complying swimming pool barrier.

Advice

- The Applicant enquired of the Committee as to the potential to re-classify the complex from a Class 2 to a Class 3 building to enable the formulation of the Pool Safety Management Plan as an alternate option.

To this end, the potential for such a change does exist and a Development Approval for Building Works would be required. As part of any reclassification, the Applicant should expect upgrades to be required in areas such as disabled access and facilities and, based upon 89 lots, contingency should be allowed for the provision of access to and within five sole occupancy units (Table D3.1 of BCA 2011). The Applicant is advised to seek the advice of a Building Certifier for further specific detail.

Don Grehan
Building and Development Committee Chair
Date: 9 December 2011

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 Local Government and Planning
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