



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	22-011
Appellant:	Scott Barrett
Respondent	Robert Blackbeard
Site Address:	15 Tannah Court Broadbeach Waters and described as Lot 33, RP 216472 – the subject site

Appeal

Appeal by the owner of a residential swimming pool owner under section 246AO of the *Building Act 1975* against the decision by a pool safety inspector to give a Form 26 Nonconformity Notice for the pool under section 246AB of the *Building Act 1975*.

Date and time of hearing:	Friday, 17 June 2022 at 12:30 pm
Place of hearing:	The subject site
Tribunal:	Don Grehan – Chair Sandra Tempest – Member
Present:	Scott Barrett – Appellant Robert Blackbeard – Respondent

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(a) of the *Planning Act 2016* **confirms** the Decision of the Respondent to issue the Form 26 Nonconformity Notice dated the 14 March 2022.

Background

1. The Appellant, in preparation for the proposed sale of the subject site, engaged the Respondent, in his capacity as a pool safety inspector, to inspect the regulated pool and to decide whether to give a pool safety certificate that states the pool is a complying pool.
2. The respondent inspected the pool barriers on the subject site and was not satisfied that the pool was a complying pool and, citing eight (8) areas of non-compliance, issued a Form 26 Nonconformity Notice (an Information Notice).
3. Given that a Form 23 Pool Safety Certificate had previously been issued for the swimming pool in 2017 and noting that a number of elements cited as non-compliances in the Form 26 Nonconformity Notice had not changed nor been altered in the interim period, the Appellant, dissatisfied with the decision of the Respondent, lodged an appeal with the Development Tribunal Registry.

Jurisdiction

4. The Tribunal has jurisdiction to hear the appeal under section 229 and Schedule 1, Section 1, Table 3, Item 3(a), of the *Planning Act 2016*, and section 246AO of the *Building Act 1975*, as the appeal is against the nonconformity notice issued by the Pool Safety Inspector and the nonconformity notice included an information notice as required under section 246AB(5) of the *Building Act 1975*

Decision framework

5. Under section 253(2) of the *Planning Act 2016*, the appellant must establish the appeal should be upheld.
6. The Tribunal is required to hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against (section 253(4) of the *Planning Act 2016*).
7. In hearing the appeal, the Tribunal was not bound by the rules of evidence and was able to inform itself in the way it considered appropriate (section 249(6) of the *Planning Act 2016*).
8. The Tribunal is required to decide this appeal in one of the ways identified in section 254(2) of the *Planning Act 2016*.

Material Considered

The material considered in arriving at this decision comprises:

9. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on the 21st of March 2022.
10. The application material including the Form 26 nonconformity notice dated the 14th of March 2022.
11. Queensland Government, Q Imagery Data, Pacific Hwy (Bermuda St – Reedy Creek Rd) 1997 dated 11 June 1997.
12. The *Planning Act 2016* (PA).
13. The *Building Act 1975* (BA).
14. The *Building Regulation 2006* (BR21).
15. Queensland Development Code Mandatory Part 3.4 – Swimming Pool Barriers (QDC MP 3.4).
16. AS 1926.1 - 2007 (Amendment 1) Swimming pool safety – Part 1: Safety barriers for swimming pools (AS 1926.1- 2007).
17. AS 1926.2 - 2007 (Amendment 1) Swimming pool safety – Part 2: Location of safety barriers for swimming pools.
18. Pool Safety Inspector Guidelines 2016.
19. Verbal submissions from the Appellant at the hearing.
20. Verbal submissions from Respondent at the hearing.
21. The inspection and measurement of the pool barrier.

Findings of Fact

The tribunal makes the following findings of fact:

22. The subject site is located in an established residential area and is an 803m² truncated rectangular shaped allotment situated on the south western corner of the intersection of Tannah Court and Villa Court Broadbeach Waters.
23. A dwelling, attached garage, attached carport and outdoor living area are located on the subject site and an inground swimming pool is situated in the north western corner of the allotment adjoining the road reserves of both Tannah Court and Villa Court.
24. A review of Q Imagery data indicates the inground swimming pool was constructed circa 1997.
25. The subject site is regulated land as defined under section 231A of the BA.
26. The swimming pool is deemed to be a non-shared, regulated pool as defined under sections 231A and 231B of the BA.
27. The swimming pool is an Outdoor Swimming Pool as defined under Schedule 2 of BA.
28. The pool safety standard applicable to this swimming pool is QDC MP 3.4 and, by reference therein, AS 1926.1 2007 Amendment 1 Swimming pool safety – Part 1: Safety barriers for swimming pools and AS 1926.2 2007 Amendment 1 Swimming pool safety – Part 2: Location of safety barriers for swimming pools.
29. The Appellant purchased the subject site in 2017 and, in accordance with Section 246ATF of the BA, a Form 23 Pool Safety Certificate, Certificate No. 101069000537 was provided in association with the contract of sale for the premises.
30. The Form 23 Pool Safety Certificate, Certificate No. 101069000537 was issued by Helen Galbraith, pool safety inspector, QBCC Licence No. PS101069, on the 28th of July 2017 with an expiry date of the 27th of July 2019. This pool safety inspector is not party to this Appeal.
31. In preparation for the proposed sale of the subject site and noting their obligations under section 246ATF of the BA, the Appellant engaged the Respondent, in his capacity as a QBCC licensed pool safety inspector, to inspect the regulated pool and to decide whether to give a pool safety certificate that states the pool is a complying pool.
32. On the 14th of March 2022 the Respondent inspected the pool for compliance with the pool safety standard and, identifying eight (8) areas of non-compliance, was not satisfied the pool was a complying pool.
33. On the 14th of March 2022 the Respondent, in accordance with s246AB of the BA, issued the Appellant with a Form 26 Nonconformity Notice (an Information Notice) detailing how the pool did not comply with the pool safety standard and citing the following issues:
 - (i) The height of existing barriers;
 - (ii) The strength and rigidity existing of barriers;
 - (iii) The climbability of objects located within the external 1200mm non-climbable Zone (NCZ);
 - (iv) The climbability of objects located within the internal 300mm non-climbable zone;
 - (v) The self-closing/self-latching capability of the existing pool gates,
 - (vi) The climbability and spacing of the gate hinges on the existing pool gates;

- (vii) The absence of resuscitation signage; and
- (viii) The climbability of the existing brick perimeter fencing.

34. Of the eight (8) cited areas of non-compliance, the Appellant is most concerned with the issues relating to the climbability of the existing tumbled brick fence separating the pool from the road reserve, and the climbability of face brickwork located adjacent to, or forming part of, the barrier for the regulated pool.
35. In relation to the climbability of the brickwork, the Appellant seeks to appeal the giving of the Form 26 Nonconformity (Information Notice) on the grounds that:
- (a) The pool safety inspector responsible for issuing the previous Form 23 Pool Safety Certificate in 2017 had considered the brickwork to be non-climbable;
 - (b) The areas in question had not changed nor been altered in the interim period; and;
 - (c) The contention that the brick faced walls do not have substantially horizontal protrusions and indentations of 10mm or more and are therefore not climbable
36. The brickwork in question relates to a brick fence comprised of tumbled masonry units that acts as the barrier that separates the pool from the road reserves of both Tannah and Villa Courts (the brick fence) and elements of the dwelling including the face finished external wall and brick piers located adjacent to the pool barrier.
37. The brick fence is approximately 32m in length with an external height of approximately 1800mm or more. Its internal height, measured above the finished surface level within the pool enclosure is, at various points, less than 1800mm given the presence of ground level decking and other landscaping features.
38. The style of construction, construction materials and weathering of the brick fence, suggests that the structure has been in place at least since the original construction of the swimming pool, if not earlier.
39. The modifications to AS 1926.1 - 2007 permitted by Schedule 1 and Figure 10 of QDC MP 3.4 allow for barriers, including boundary fencing, to incorporate elements that act as a hold for climbing on their external face provided that:
- (a) The height of the barrier is not less than 1800mm measured above finished ground level on the inside of the pool enclosure; and
 - (b) A 900mm non-climbable zone, free of climbable objects, is located on the inside of pool enclosure measured in an arc from the top of the barrier, so that a young child may not climb down.
40. Clause 2.3.3 of AS 1926.1 - 2007 confirms that projections and indentations, or any combination thereof, must not form a substantially horizontal surface with a depth greater than 10mm within a required non-climbable zone of the swimming pool barrier unless such projections or indentations are spaced greater than 900mm apart measured in the vertical plane.
41. QDC MP 3.4 is a performance-based code which may be satisfied by complying with the relevant acceptable solution for the performance requirement or, by formulating an alternative solution that complies with, or is shown to be at equivalent to, the relevant performance requirement or, a combination of these measures. Notwithstanding, the Pool Safety Inspector Guidelines 2016 confirm that a performance solution to the pool fencing standards can only be applied by a licensed building certifier during the pool's development approval stages.

42. Section 245 of the BA permits the owner of a regulated pool to apply to the Local Government seeking exemption from complying with a part of the pool safety standard relating to barriers for the regulated pool on the basis on impracticality.
43. The Tribunal conducted a visual inspection and measurements of the barrier at the time of the hearing.

Reasons for the Decision

44. The tumbled nature of the masonry units and the horizontal bed joints of the brick fence are surface indentations or projections that form substantially horizontal surfaces with a depth greater than 10mm.
45. The tumbled nature of the masonry units and the horizontal bed joints of brickwork located adjacent to the pool barrier are surface indentations or projections that form substantially horizontal surfaces with a depth greater than 10mm.
46. The substantially horizontal surfaces with a depth greater than 10mm located in the brick fence, and in the brickwork located adjacent to the pool barrier, are less than 900mm apart when measured in the vertical plane and may act as a hold for climbing.
47. The height of the brick fence is, at various points, less than 1800mm measured above finished ground level on the inside of the pool enclosure. Accordingly, the external face of this barrier must not include surface indentations or projections that may act as a hold for climbing that are less than 900mm apart when measured in the vertical plane.
48. Substantially horizontal surfaces with a depth greater than 10mm are located within the 900mm non-climbable zone located on the inside of pool enclosure measured in an arc from the top of the brick fences. Accordingly, these projections and surface indentations may act as a hold for climbing down into the enclosure.
49. The previous Pool Safety Certificate, Reference No. 101069000537, expired on the 27th of July 2019 and was issued by pool safety inspector, who is not party to this Appeal. The Tribunal does not consider the issuing of the previous certificate relevant to this decision and accordingly, that this matter must be decided on the basis of the application of the pool safety standard relative to the Form 26 Nonconformity Notice (an Information Notice) issued by the Respondent on the 14th of March 2022.

Don Grehan

Development Tribunal Chair
Date: 26 August 2022

Appeal Rights

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

The appeal must be started within 20 business days after the day notice of the Tribunal decision is given to the party.

The following link outlines the steps required to lodge an appeal with the Court.

<http://www.courts.qld.gov.au/courts/planning-and-environment-court/going-to-planning-and-environment-court/starting-proceedings-in-the-court>

Enquiries

All correspondence should be addressed to:

The Registrar of Development Tribunals
Department of Energy and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone 1800 804 833

Email: registrar@hpw.qld.gov.au