



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	34 - 10
Applicant:	Pamela Sreboff
Assessment Manager:	Gold Coast City Council
Concurrence Agency: (if applicable)	N/A
Site Address:	15 Ardrossan Place, Highland Park and described as Lot 369 on RP 221443 – the subject site

Appeal

Appeal under section 533 of the *Sustainable Planning Act 2009* (SPA) about an enforcement notice dated 27 April 2010, and under section 532 (a) of the SPA about an information notice dated 8 July 2010, issued by Council in relation to swimming pool fencing on the basis that the fencing does not comply with the required standards as is therefore considered dangerous.

Date of hearing:	11.00 am – Tuesday 17 August 2010
Place of hearing:	The subject site
Committee:	Ray Rooney – Chair
Present:	Pamela Sreboff – Applicant Alex Kamenev – Applicant's representative Brian Gobie – Council

Decision:

The Committee, in accordance with section 564 of the SPA:

1. **changes** the information notice issued by Council on 8 July 2010, and decides that
 - a. Requirements 1, 2 and 3 apply, and;
 - b. Requirement 4 – the completion time be fifteen (15) business days from the date of this decision
2. **sets aside** the enforcement notice issued by Council on 27 April 2010.

Background

The subject site contains a swimming pool, which was approved in 1989 under the requirements of Albert

Shire Council local laws. The fencing contained 800mm high fencing/balustrades to the balcony of the house at a higher level.

The applicant purchased the property in 1995.

On 23 October 2009, Council issued a notice requiring the owner to isolate the pool from the dwelling and surroundings with a compliant pool fence including side gate within 10 days. Computer records confirm a verbal extension to comply dated 29 April 2010.

On 7 April 2010, Council issued a penalty infringement notice (PIN). This was returned to Council on 12 May 2010.

On 16 April 2010, Council issued an enforcement notice, this was returned to Council on 21 April 2010.

On 19 April 2010, the pool fencing was substantially completed in accordance with the notice, dated 23 October 2009.

On 27 April 2010, Council issued an enforcement notice, the same as the one issued 16 April but with amended dates to comply by 12 May 2010.

On 2 May, the applicant lodged an appeal against the enforcement notice dated 27 April 2010.

On 3 May 2010, the applicant requested Council inspect the fencing for compliance under section 244 and advise as to compliance.

On 24 May 2010, Council hand delivered a second PIN similar to that issued on 7 April 2010.

On 23 June 2010, the applicant forwarded a form 10 in support of appeal lodged 2 May 2010.

On 2 July 2010, Council inspected the fencing and determined it did not comply. The inspector spoke to Alex Kamenev, who confirmed that a substantial portion of the fencing had been replaced. The inspector also observed gaps in the boundary fence and indicated building certification would be required to obtain compliance.

On 8 July 2010, Council issued an information notice referring to the inspection carried out on 2 July, confirming the fencing was substantially repaired and a new fence had been constructed around the pool. The notice required the owner to do the following:-

1. Obtain a development permit for the swimming pool fencing from a private builder certifier.
2. Obtain from a private building certifier a final inspection certificate (form 17).
3. Provide Council a copy of the form 17.
4. All of the above to be completed within ten (10) business days of the date of this information notice.

On 23 July 2010, the applicants sent a letter to Council indicated an appeal against the requirements of the information notice was mutually agreed upon.

On 29 July 2010, an application for appeal was submitted to the Building and Development Dispute Resolution Committee in respect to meeting the requirements 1, 2, 3 and 4 of the notice dated 8 July 2010. That is, obtaining private certification. Reference is also made to the appeal, 2 May against the enforcement notice dated 27 April 2010.

On 29 July 2010, the applicant advises the Registry that the appeal is against both the enforcement notice and information notice, the issues being covered the same.

At the hearing, the appellant expressed a view that the enforcement notice issued by Council should be rescinded. Council agreed this would simplify the process, and would most likely support this provided the requirements of the information notice were satisfied.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Registrar on 26 May 2010.
2. The inspection notice dated 23 October 2009.
3. The enforcement notice dated 27 April 2010.
4. The information notice dated 8 July 2010.
5. All correspondence as indicated under background.
6. Verbal submissions by the appellant and Council representatives at the hearing on 17 August 2010.
7. The SPA.
8. The *Building Act 1975* (BA).

Findings of Fact

The Committee makes the following findings of fact:

- The pool was approved in 1989 by the Albert Shire Council.
- Council inspection on 23 October 2009 indicated that the fencing did not comply with the pool fencing standards.
- New fencing was substantially installed by 19 April 2010 but required further work in order to comply.
- The applicant advised this further work to boundary fencing was to be undertaken on 17 August 2010.
- The boundary fencing at the rear of the property sits on top of retaining walls, the height and nature of which may be taken into consideration in determining the likelihood of access by young children from adjoining properties.

Reasons for the Decision

With regard to the appeal against the issuing of the enforcement notice, the applicant's letter dated 23 July 2010 to Council expressed the view that the appeal should proceed in relation to section 244 of the BA, under which the information notice was issued.

At the meeting, Council indicated that it was likely to agree to this.

The committee is of the view that the fencing was essentially in place at the time of receipt of the enforcement notice, would inhibit a young child from gaining access to the pool, and taking into consideration the retaining wall barriers on the adjoining boundaries is therefore not dangerous. Accordingly, the Committee changes the decision of Council to issue the enforcement notice.

With regard to the appeal against the requirements set out in the information notice in response to advice as to compliance made under section 244 of the BA, the committee is of the opinion that:

- Having given the owner the requirements to meet in order to provide compliant fencing, that Council have satisfied the intent of section 244 of the BA, and that;
- As the fencing has been substantially replaced with new fencing complying with current standards, Council's direction in the information notice dated 8 July 2010 that the owner obtain a development permit and final inspection certificate (form 17) from a private certifier is in accordance with section 237 of the BA.

Ray Rooney
Building and Development Committee Chair
Date: 6 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