



**Building and Development Tribunals**

**Queensland Government**

Department of **Local Government and Planning**

**APPEAL**

**File No. 3-07-015**

*Integrated Planning Act 1997*

**BUILDING AND DEVELOPMENT TRIBUNAL - DECISION**

**Regulator:** Douglas Shire Council

**Site Address:** *withheld*-“the subject site”

**Appellant** *withheld*

**Nature of Appeal**

Appeal under Chapter 9 Section 250 of the *Building Act 1975* against the issuing of Enforcement Notice for a non compliant pool fencing and inadequate swimming pool security in accordance with the *Building Act 1975*, AS1926.1 AS1926.2 and Douglas Shire Council “Local Law No 46 Swimming Pools” resulting in the swimming pool on land at “the subject site” being dangerous and unfit for use.

**Date and Place of Hearing:** On the bases of written submissions

**Tribunal:** Mr Warren Bolton

**Submitters:** Appellant  
Mr Jeff Evans – Douglas Shire Council Representative

**Decision:**

The Enforcement Notice of the Douglas Shire Council dated 6 March 2007, to either repair and rectify the pool fencing and pool security associated with a swimming pool or fill the pool with solid material on land described as “the subject site” so as to comply with the *Building Act 1975*, AS1926.1 AS1926.2 and Douglas Shire Council “Local Law No 46 Swimming Pools” is valid, however the decision of the Council is **set aside** and **replaced with the following-**

The swimming pool located on land described as “the subject site” owned by *withheld* and situated at *withheld* shall, by the 23 May 2007 be

1. Enclosed by a fence;
2. The fence shall be –
  - 2.1. at least 1200mm high;
  - 2.2. constructed and maintained that a person cannot enter the swimming pool except by climbing over the fence or passing through a gateway;

- 2.3. constructed from solid concrete, concrete masonry block, brick, solid timber fence sheeted vertically, vertical bars of approved material spaced not more than 100mm apart with horizontal bars located at the extreme top and bottom of the fence; or
  - 2.4. such other fence as the Council may approve.
3. The fence may comprise a wall of a building or structure so long as the building or structure does not comprise any opening within 1200mm of the ground level.
  4. Every gate in the fence shall be –
    - 4.1. the same height as the fence;
    - 4.2. constructed to open outwards only;
    - 4.3. fitted with a self closing device satisfactory to the Health Surveyor of Douglas Shire Council;
    - 4.4. fitted with a lock at the highest point of the gate; and
    - 4.5. kept locked except where a person is passing through it or a person is within the fence enclosure.

Failure to comply with this notice constitutes an offence under section 4.3.15 of *Integrated Planning Act 1997* for which a maximum penalty of 1665 penalty units is provided.

### **Material Considered**

The material considered in arriving at this decision comprises:

- Form 10 – Notice of Appeal;
- Enforcement Notice of the Douglas Shire Council dated 6 March 2007;
- Submission of the applicant;
- Submission of Douglas Shire Council;
- *Building Act 1975*;
- *Integrated Planning Act 1997*;
- *Local Government Act 1993*;
- *Acts Interpretation Act 1954*; and
- Douglas Shire Council’s Local Law No. 46 Swimming Pool.

### **Findings of Fact**

I make the following findings of fact:

- Douglas Shire Council’s (the Council) issued an Enforcement Notice (the Notice) dated the 6 March 2007 in relation to land described as “the subject site”.
- The Notice contains a number of drafting errors namely, reference to-
  - Section 22 of the *Building Act 1975* (the Act) as the relevant section under which the authority of the notice was issued - The relevant section is 248.
  - Sections 23 & 24 of the Act as the relevant sections for authority to issue instructions and appeal rights - The relevant sections are 249 and 250.

- Local Law No. 42 under which compliance was required - Local Law No 42 is titled “Caravans, Caravan Parks Tents and Camping”.
- The Council by letter dated 30 March 2007 advised the Appellant that the notice had been reissued with reference to local law identified as “Local Law 46 Swimming Pools”.
- The buildings at “the subject site” are classified under the Building Code of Australia as Class 3.
- The swimming pool situated at the same address is provided for the use of guests accommodated by these buildings.
- Section 235 of the Act provides that the pool owner of an *outdoor swimming pool* on *residential land* must ensure the pool has, around the pool, fencing complying with the *fencing standards* for the pool and the fencing is kept in good condition. *Residential land* is defined under the Act as land on which a Class 1 or 2 building is constructed, or is to be constructed.....”.
- Douglas Shire Council has a local law titled “Local Law No 46 Swimming Pools” (the Local Law). Section 1 provides a definition of a “swimming pool” as *all pools and other receptacles which are capable of being used for swimming or bathing purposes whether such pool or receptacle is wholly or partly filled with water or not; The term includes any equipment used for the filtration and/or chlorination of the water of any such pool or receptacle: The term does not include the ‘fill and empty’ type pools which have a water capacity of less than six thousand eight hundred and twenty (6820) litres.*
- The swimming pool on the subject land is not a “*fill and empty’ type*” and in any event has a capacity considerably in excess of 6820 litres.
- The Local Law provides in Section 26(1) that a *swimming pool* shall be enclosed by a fence and details the specification and maintenance requirements for that fence.
- Apart from Section 26, the Local Law has no other specification relating to constructing or maintaining a fence around a swimming pool.
- The Local Law has no provisions for the issue of an enforcement notice. Douglas Shire Council has no other local law that has provisions for the issue of an enforcement notice.
- The *Local Government Act 1993* makes no provision for the issue of enforcement notices for a provision of a local law.
- Section 248 of the Act makes provision for the issue of an enforcement notice to the owner of a *structure* if a local government reasonably believes a *structure* is dangerous or unfit for use.
- Section 249 of the Act provides that an enforcement notice may require a person to repair or rectify a *structure* or to secure a *structure*.
- A swimming pool fence is a “*structure*” within the meaning of the Act.

### **Reasons for the Decision**

- Section 49 of the *Acts Interpretation Act 1954* makes provision for “*substantial compliance*” in satisfaction of obligations in the production of a form. In this particular case, it is the Tribunal’s view that the enforcement notice is likely to be valid, despite the minor mistakes when referencing the relevant provisions and given the Council reissued the notice addressing the errors of the Notice. It is accepted, for the purposes of this appeal, the errors were not fatal to the notice.

- The intent of section 235 of the Act is to require swimming pools, located on land on which a Class 1 or 2 building has been or is to be constructed to be fenced to the required *fencing standards* set out in the *Building Regulation 2006* (the Regulation). As the subject land contains only Class 3 buildings, the requirements of section 235 of the Act are not relevant to the swimming pool on that subject land.
- The intent of sections 248 and 249 of the Act is to provide local governments with the authority to issue an enforcement notice to an owner of a *structure* that a local government reasonably believes is dangerous or unfit for use and to require the owner of that *structure* to take reasonable and relevant action to repair the structure or rectify the circumstance responsible for the dangerous or unfit condition. A swimming pool fence is a *structure*.
- The Council's adopted Local Law required all pools in the Shire, *except 'fill and empty' type pools with capacity of less than 6 820 litres*, to be protected by a fence specified in that Local Law. The adoption of the Local Law is prima facie evidence that the Council considered that all *swimming pools*, situated on land within the Shire, needed to be protected by a fence to the standard prescribed in the local law. While the Local Law lacks a statement of objectives, the Tribunal accepts that the most likely objective is to protect children from the dangers posed by unfenced pools and to provide a standard of pool fencing to remove or minimize that danger.
- The Council, in the Notice, outlined a number of circumstances, observed at the time of an inspection on the 19 February 2007 on the subject land that did not comply with the regulations. However, while the Council did not indicate in the Notice if these circumstances also constituted the bases upon which the Council formed the opinion that the fencing structure was dangerous or unfit for use, the Council did indicate that these circumstances constituted the reasons for the service of the Notice.

The Tribunal finds that –

- The test in this matter is not to consider compliance with the Regulation under the Act but to examine circumstances that satisfy the intent of the Notice regarding the dangerous nature of the swimming pool fence and thus its fitness for use;
- The Local Law of the Council is a relevant referral document for use in determining what may constitute a reasonably dangerous circumstance in relation to the swimming pool fence structure on the subject land and accordingly that fence's fitness for use;
- The Notice served by the Council defined some circumstances that existed on the subject land which could constitute the dangerousness and unfit for use circumstances which are consistent with the intent of the Local Law. However, to the extent circumstances detailed in the Notice merely constituted a failure to comply with the Regulation, they are not relevant;
- The provisions, in the Notice, of a specified option to fill the pool with solid material is not a reasonable or relevant statutory condition.

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**Warren Bolton**  
**Building and Development Tribunal General Referee**  
**Date: 19 April 2007**

## **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  
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