



## Development Tribunal – Decision Notice

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### *Planning Act 2016, section 255*

<b>Appeal Number:</b>	<b>21-072</b>
<b>Appellant:</b>	Julie Gerhardt
<b>Respondent (Enforcement Authority):</b>	Sunshine Coast Regional Council ( <b>Council</b> )
<b>Site Address:</b>	37 Edwardson Drive, Pelican Waters, in the State of Queensland being Lot 266 on SP110570 ( <b>Premises</b> )

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### **Appeal**

An appeal under section 229 and Item 6 of Table 1 of Schedule 1 of the *Planning Act 2016* against the decision of Council to give an enforcement notice under section 248 of the *Building Act 1975* dated 13 December 2021, requiring action to comply with the pool safety standard for a regulated pool on the Premises.

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<b>Date and time of hearing:</b>	24 June 2022 at 1.00pm
<b>Place of hearing:</b>	37 Edwardson Drive, Pelican Waters
<b>Tribunal:</b>	Stafford Hopewell – Chair James Dunstan - Member
<b>Submissions provided by:</b>	Appellant – Trevor Gerhardt Sunshine Coast Council – Roslyn McDermott and Peter Chamberlain

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### **Decision:**

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(c) of the *Planning Act 2016* (**PA**), decides to replace with the decision of the Council to give the enforcement notice under section 248 of the *Building Act 1975* (**BA**) dated 13 December 2022 (**Enforcement Notice**) with a decision not to give the Enforcement Notice.

### **Background**

1. The Appellant is the owner of the Premises, upon which is constructed a single storey dwelling house with a swimming pool.
2. The swimming pool was constructed in 1999.
3. The Premises back onto a canal with the swimming pool located at the rear of the Premises fronting the canal.

4. The dwelling house, including swimming pool, is currently in the process of being renovated.

### **Site Inspection**

5. A site inspection of the Premises was carried out in conjunction with the hearing which was held at the Premises.
6. The Appellant was represented by Trevor Gerhardt at the hearing with Roslyn McDermott and Peter Chamberlain attending on behalf of the Council.
7. The site inspection showed that substantial earthworks are in progress in the backyard of the Premises as part of the renovation and extension of the dwelling house on the Premises and at the time the swimming pool was substantially drained of water and not in use.
8. Significant excavation has been carried out between the swimming pool and the property boundary on the canal and the swimming pool is currently unfenced.
9. Returns were in place at the boundary with the adjoining properties on the canal frontage and side fencing was present on the property boundaries with the neighbouring properties.
10. At the time of the inspection, a side fence was in place on the right hand side of the Premises (viewed from the street facing the dwelling house) but the side fence on the left hand side had been removed to allow access for machinery from the street to the backyard where the works were being carried out.
11. Sliding doors from the dwelling house opening onto the backyard had locks to prevent access from the house to the backyard.

### **Hearing**

12. The hearing was held at the Premises on 24 June 2022 commencing at about 1pm.
13. At the hearing, both parties made oral submissions in support of their respective positions and took the opportunity to supplement their oral submissions by handing various documents to the Tribunal, including historical approvals and plans in relation to the house and swimming pool.
14. The material given to the Tribunal at the hearing by the parties has been provided to the Registry and circulated to the parties.

### **Enforcement Notice**

15. Council has given the Appellant the Enforcement Notice as the owner of residential land on which there is a regulated swimming pool which in Council's opinion does not comply with the pool safety standard, which is a contravention of section 232D of the BA.
16. Council formed the opinion that the pool barriers were non-compliant with the prescribed pool safety standard during a compliance inspection by authorised officers on 2 December 2021.
17. The Enforcement Notice does not expressly state that the Enforcement Notice was given without first giving a show cause notice on the basis that the building work is dangerous. However, the enforcement notice does state that as the swimming pool is dangerous any appeal must be started within 5 business days after the Enforcement Notice is given.

## Required Action

18. The Enforcement Notice requires the following actions by 16 December 2021:
  - (a) Re-instate the return (access denial panel) between properties 37-39 to prevent direct access into the swimming pool enclosure from the neighbouring property; and
  - (b) Ensure the return is a minimum of 1200mm high and extends out along the revetment wall for a minimum distance of 900mm; and
  - (c) Ensure the return does not provide any handholds or footholds to access the swimming pool enclosure; and
  - (d) Ensure the return is installed along the revetment wall on the canal boundary. Pool returns must not trespass out into the canal or permanent waterway (QDC MP 3.4, Figure 19 Option A).
19. The Enforcement Notice also required the following action by 17 January 2022:
  - (a) Install an isolating complying swimming pool barrier to prevent access into the swimming pool enclosure from the canal and both neighbouring properties.

## The Appeal

20. The Appellant filed a Notice of Appeal (Form 10) dated 14 December 2021 with the Tribunal's Registry which was received on 16 December 2021.
21. The Appellant's Form 10 is attached with "Document A" which sets out the Appellant's grounds of appeal.
22. In summary, the Appellant disputes that the situation in relation to the swimming pool is dangerous.
23. The Appellant raises various grounds as why the swimming pool is not dangerous, including that Council approved the existing swimming pool, existing pool barrier and existing canal wall in about 1999.
24. The Appellant also takes issue that Council did not give a show cause notice as required by section 248(3) of the BA before giving the Enforcement Notice.

## Jurisdiction

25. Schedule 1 of the PA governs the matters that may be appealed to a tribunal.<sup>1</sup>
26. Section 1(1) of Schedule 1 of the PA provides that Table 1 states the matters that may be appealed to a tribunal. However, pursuant to section 1(2) of Schedule 1 of the PA, Table 1 only applies to a tribunal if the matter involves a matter set out in sub-section (2).
27. Section 1(2)(h)(i) of Schedule 1 of the PA, relevantly refers to a decision to give an enforcement notice in relation to a matter under paragraphs (a) to (g) of section 1(2).
28. The Appeal is against the decision to give an enforcement notice about a matter that relates to the BA, being section 1(2)(g), and accordingly satisfies section 1(2)(h)(i) of Schedule 1 of the PA.
29. The Tribunal is therefore satisfied that it has jurisdiction to decide the Appeal.

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<sup>1</sup> Section 229(1)(a) of the PA.

## Decision framework

30. The Appellant is the recipient of the Enforcement Notice and accordingly, Council, being the enforcement authority that gave the Enforcement Notice, must establish that the Appeal should be dismissed.<sup>2</sup>
31. The Tribunal is required to hear and decide the Appeal by way of a reconsideration of the evidence that was before Council when it decided to give the Enforcement Notice.<sup>3</sup>
32. The Tribunal may (but need not) consider other evidence presented by a party with leave of the Tribunal<sup>4</sup>.
33. The PA provides the Tribunal with broad powers to inform itself in the way it considers appropriate when conducting a tribunal proceeding and may seek the views of any person<sup>5</sup>.
34. The Tribunal may consider other information that the Registrar asks a person to give to the Tribunal.<sup>6</sup>
35. The Tribunal may decide that the Tribunal has no jurisdiction to decide the tribunal proceedings.<sup>7</sup> Otherwise, the Tribunal is required to decide the appeal in one of the following ways set out in section 254(2) of the PA:
  - (a) *confirming the decision; or*
  - (b) *changing the decision; or*
  - (c) *replacing the decision with another decision; or*
  - (d) *setting the decision aside and ordering the person who made the decision to remake the decision by a stated time; or*
  - (e) *for a deemed refusal of an application:*
    - (i) *ordering the entity responsible for deciding the application to decide the application by a stated time and, if the entity does not comply with the order, deciding the application; or*
    - (ii) *deciding the application.*

## Material Considered

36. The material considered in arriving at this decision comprises:
  - (a) 'Form 10 – Appeal Notice', grounds for appeal and information accompanying the appeal lodged with the Development Tribunals Registrar on 16 December 2021;
  - (b) Bundle of documents handed to the Tribunal by the parties at the Tribunal hearing on 24 June 2022;
  - (c) *Planning Act 2016*;
  - (d) *Building Act 1975*;

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<sup>2</sup> Section 253(3) of the PA.

<sup>3</sup> Section 253(4) of the PA.

<sup>4</sup> Section 253(5)(a) of the PA.

<sup>5</sup> Section 249 of the PA.

<sup>6</sup> Section 253 and section 246 of the PA.

<sup>7</sup> Section 252(1) of the PA.

- (e) Queensland Development Code.

### **Findings of Fact**

37. The Tribunal finds that the canal revetment wall is less than 1200mm high and does not comply with the pool safety standard. This is common ground between the parties and is not disputed (although the significance of the non-compliance and whether it makes the swimming pool dangerous is disputed).
38. The Tribunal further finds that having regard to the current state of renovation and construction occurring at the Premises, the swimming pool is in the process of being (re)constructed and is not currently in use.

### **Reasons for the Decision**

39. Chapter 8 of the BA deals with swimming pool safety.
40. Part 1 of chapter 8 deals with interpretation and defines various terms and concepts used to regulate swimming pool safety.
41. Part 2 of chapter 8 deals with the substantive obligations in relation to swimming pool safety. Division 1, section 232 requires that the owner of a regulated pool must ensure that the pool complies with the pool safety standard for the pool and all barriers for the pool are kept in good condition.
42. Division 2 deals with requirements about constructing regulated pools. Section 234 applies to a person if a regulated pool has been or is being constructed and the pool has not been filled with water to a depth of 300mm or more.
43. In this situation, the person must, unless the person has a reasonable excuse, ensure that, before the pool is filled with water to a depth of more than 300mm or more, a building certifier has provided a certificate in the approved form stating that the pool is a complying pool.
44. The Tribunal has been provided with a copy of a pool safety certificate dated 15 September 2015 which had an expiry date of 14 September 2017. The Tribunal has not been referred to any later or current pool safety certificate.
45. At the time of this pool safety certificate (which was required when selling or leasing a property with a regulated pool), the swimming pool was assessed to comply with the pool safety standard.
46. It is however evident that substantial works have been carried out to the swimming pool enclosure and surrounds of the swimming pool since that time and construction work is currently being carried out in relation to the dwelling house and swimming pool.
47. In this circumstance, the Tribunal considers that while previously the pool comprised a regulated pool that was required to comply with the pool safety standard in accordance with section 232 of the BA, the present state of construction is such that division 1, section 232 is not applicable, and division 2, sections 233 to 234 of the BA is the relevant and controlling provision of the BA.
48. This is on the basis that given the substantial works to the swimming pool enclosure and surrounds, the former measures have either been removed or may no longer be compliant and the final form of measures to comply with the pool safety standard cannot be determined until the works are completed.
49. In this regard, the Appellant noted that the scope and design of the renovations were not finalised and subject to change.

50. Importantly, the Tribunal notes that the swimming pool is not in use and is largely drained of water and the Appellant indicated its intention not to fill the swimming pool until the finalisation of the works.
51. Effectively, the swimming pool and surrounds are in the process of construction as part of the renovation of the Premises.
52. Under section 234 of the BA, given the state of construction, the pool must not be filled with water to a depth of 300mm or more and a person must ensure that before the pool is filled with water to depth of 300mm or more, a building certifier has provided a certificate in the approved form stating that the pool is a complying pool.
53. Section 234 of the BA therefore prohibits the filling of the pool with water to a depth of 300mm or more until such time that the pool complies with the pool safety standard.
54. This will prevent any danger being caused by the pool and allow the Appellant to finalise and carry out the renovations (subject to obtaining relevant approvals<sup>8</sup>) and ensuring that a building certifier provides a certificate in the approved form stating that the pool is a complying pool before the pool is filled.
55. If the swimming pool is filled with water to a depth of 300mm or more before a certificate is issued, the Appellant will be committing a development offence and Council can take action to remedy the offence (or prosecute the offence).<sup>9</sup> It is noted that obligations also apply in relation to having a warning sign displayed at the Premises in accordance with section 233 of the BA.
56. Given the Tribunal considers that section 234 is the primary controlling provision of the BA having regard to the current state of construction at the Premises, the Tribunal believes that section 232 of the BA is not applicable, and Council erred in giving the Enforcement Notice in response to alleged contravention with section 232 of the BA.
57. The Tribunal therefore finds that the Appellant is not presently required to comply with section 232 of the BA and the Tribunal is satisfied that the Enforcement Notice should be set aside.
58. Further, given this finding by the Tribunal, it is not necessary for the Tribunal to determine the parties' contentions about the lawfulness or merits of the Enforcement Notice to dispose of the appeal.

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**Stafford Hopewell**  
**20 July 2022**

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<sup>8</sup> A building development approval is required for assessable building work and it is the owner's obligation to ensure that assessable building work carried out in relation the renovation of the Premises, including reconstruction of the swimming pool, is appropriately approved and carried out in compliance with any applicable approval. Council may take enforcement action if assessable development is carried out without necessary approval.

<sup>9</sup> At the site inspection, the swimming pool was observed to have water to depth of more than 300mm, being approximately 500mm. The Appellant indicated that this was likely due to recent rain and action would be taken following the hearing to drain the water to a depth of not more than 300mm and install an automated pump to maintain the depth of water at less than 300mm. The Tribunal subsequently made an order requiring the depth of water in the pool to be maintained at less than 300mm and the Appellant confirmed action had been taken to comply with the order.

## **Development Tribunal Chair**

**Date: 20 July 2022**

### **Appeal Rights**

Schedule 1, Table 2, item 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 (07) 1800 804 833**

**Email: [registrar@epw.qld.gov.au](mailto:registrar@epw.qld.gov.au)**