



Building and Development Dispute Resolution Committees—Decision

Sustainable Planning Act 2009

Appeal Number:	32- 12
Applicant:	K.D.Dorrich & W.D.Wiggins
Assessment Manager:	Cairns Regional Council (Council)
Concurrence Agency: (if applicable)	Not Applicable
Site Address:	90 Cassowary Street, Freshwater and described as Lot 21 on RP 738558- the subject site

Appeal

Appeal under section 527 of the *Sustainable Planning Act 2009* (SPA) against the Decision Notice of Cairns Regional Council to refuse an application for exemption – compliance impracticable from the pool safety standard related to barriers for regulated pools

Date of hearing:	19 September 2012
Place of hearing:	The subject site
Committee:	Malcolm Edmiston – Chair
Present:	Annmaree Ingham– Godwin Witten Real Estate for Applicant Chris Crosland– Pool Fencer for Applicant John Evans – Cairns Regional Council Debbie Lawson – Cairns Regional Council

Decision:

The Building and Development Dispute Resolution Committee (Committee), in accordance with section 564 of the SPA, sets aside the decision of Council and replaces it with the following decision.

The pool fencing around the pool will comply with the Queensland Development Code (QDC) MP3.4 (QDC MP3.4) Swimming Pool Barriers when :-

- (a) the existing panels between the columns are replaced with panels complying with Australian Standard 1926.1:2007 (Standard);
- (b) a new fence complying with the Standard is erected which extends from the existing column closest to the house, around the pool to the rockface;
- (c) the new fence shall provide adequate space to provide access around the pool within the fence and a minimum 900mm clearance around the outside of the fence;

- (d) the new fence shall incorporate a gate complying with the Standard;
- (e) the new fence is to abut the near vertical rockface;
- (f) the new panels will be 1500mm high;
- (g) the barrier formed by the rockface of the hill will meet Performance Requirements P1(a)(b)(c) of QDC MP3.4, and
- (h) a current resuscitation sign is to be installed within the pool area.

The Applicants are to ensure the work is completed within 20 business days of the date of this decision and have a Pool Safety Inspector inspect the work and issue a Pool Safety Certificate.

Background

The subject property was leased to a tenant on 14 April 2011 thereby requiring compliant pool fencing. A pool safety nonconformity notice was issued on 3 June 2011 for the pool at the subject site. The nonconformity notice identified defects in the existing pool fencing and gates and the need to provide fencing in lieu of the existing security doors opening into the pool area. The applicants accepted that the remaining items below did not comply and agreed to rectify these:

- (a) direct access through kitchen window;
- (b) gate to west side does not self close or latch;
- (c) hinges less than 900 mm apart;
- (d) gaps in fence greater than 100 mm and fails rigidity test;
- (e) gates do not self close;
- (f) resuscitation sign missing;
- (g) climbable points on gate

The back of the pool is at the base of a very steep hill which is close to vertical. The Pool Safety Inspector (PSI) required this to be fenced however the Applicants disagreed. The PSI provided a copy of the pool safety nonconformity notice to Council as required by Section 246C(4)(b) of the *Building Act 1975* (BA).

Council issued correspondence dated 26 September 2011 advising of its intention to issue an Enforcement Notice. The Applicants, through their real estate agent applied for an exemption to the pool safety standard on the basis of impracticality in accordance with section 245 of the BA. Council refused the application as they believe that:

- (a) the steep embankment and the difficulty in erecting pool fencing around the unprotected pool was insufficient grounds to approve an exemption; and
- (b) the risks associated with the pool being partially unfenced are too immense considering the premises are accessible to a young child.

The Applicant dissatisfied with Council's refusal appealed the Decision Notice to the Committee.

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 18 July 2012.
2. Cairns Regional Council Decision Notice dated 3 July 2012.
3. Pool nonconformity notice dated 3 June 2011.
4. Council letter of 26 September 2011
5. Application for an Exemption dated 1 June 2012.

6. QDC MP3.4 – Swimming Pool Barriers
7. *Building Act 1975* (BA)
8. *Sustainable Planning Act 2009* (SPA)
9. Australian Standard 1926.1:2007 (Standard)

Findings of Fact

The Committee makes the following findings of fact.

The intent of QDC MP4.3 and the Standard is to safeguard 'young children' from drowning or injury in regulated pools. A young child is defined in the Standard and Schedule 2 of the BA as being a child under the age of five years.

The existing 1500mm high fencing and gates do not comply with the Standard because the spacing between the verticals is too great thereby allowing a young child to squeeze through the fence.

The gates are non compliant as they are not self closing or able to be made to self close and the windows opening into the pool area do not comply with Section 2.7 of the Standard as they are only protected by insect screening rather than security screens.

The doors opening into the pool area are protected by security screen doors complying with Section 2.8 of the Standard, however Schedule 1 of QDC MP3.4 specifically states section 2.8 of the Standard does not apply.

The Applicants have been aware of the non-compliance of the existing fencing but have not carried out any work because of the dispute regarding the PSI's requirement to fence the rockface. This has resulted in the non-compliance continuing for a further 15 months. The Applicants must now expedite the measures for compliance.

The near vertical hill is rock with a smooth surface with minimal vegetation such that a young child could not climb it to gain access over a 1500 high pool fence which abuts the rockface.

Reasons for the Decision

The Applicants propose to replace the existing pool fencing panels with compliant panels and have the existing pool gate removed.

A new fence with a compliant gate will continue around the pool, leaving access around the pool from inside the fence and a minimum of 900mm clearance around the outside of the fence which will abut the rockface of the hill. These measures will provide a fence complying with the requirements of QDC MP4.3 and the Standard.

Building and Development Committee Chair
Date: 22 October 2012

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 Housing and Public Works
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