



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	19-045
Appellant:	Tim Edwards
Respondent:	Sunshine Coast Regional Council
Site Address:	34 Adaluma Avenue, Buddina and described as Lot 442 on RP 118150 – the subject site

Appeal

Appeal under section 229 and item 6 of table 1 of section 1 of schedule 1 of the *Planning Act 2016* (**Planning Act**) against an Enforcement Notice issued by the Sunshine Coast Regional Council (**Council**) on 1 October 2019 alleging failure to comply with the Pool Safety Standard pursuant to section 232 of the *Building Act 1975* (**Building Act**).

Date and time of hearing:	11:00am on Wednesday 27 November 2019.
Place of hearing:	The subject site
Tribunal:	Ain Kuru – Chair Stuart Smith - Member
Present:	Tim Edwards – Appellant Roslyn McDermott - Technical Compliance Officer – Pools, Sunshine Coast Regional Council Peter Chamberlain - Coordinator and Senior Building Certifier, Sunshine Coast Regional Council

Decision:

The Development Tribunal (**Tribunal**), in accordance with section 254(2)(a) of the Planning Act confirms the decision of Council to issue the Enforcement Notice.

Background:

Subject Property

1. The subject property has been developed for residential purposes with a detached house, swimming pool, deck and other improvements. Tidal land containing a canal is located along the rear boundary of the property. The swimming pool and deck are located at the rear of the house, with the deck located over the tidal land. A gangway leads from the swimming pool and deck to a pontoon on the canal.

2. Glass fencing and the wall on the west boundary form the pool fence. There are three pool gates, which open from the pool area to:
 - the outdoor area between the house and pool;
 - the shoreline of the canal; and
 - the gangway leading to the pontoon.
3. Part of the glass fencing and gate to the pontoon are located on the deck over the canal.

Previous Appeal (Development Tribunal Appeal No. 19-006)

4. Council found that the swimming pool fence was not compliant with the Pool Safety Standard under the Building Act and issued an Enforcement Notice to the owner on 9 February 2019. The owner subsequently lodged an appeal against the Enforcement Notice. The Tribunal set aside the decision of the Council to issue the Notice and ordered the Council to remake the decision.
5. The previous Tribunal found it was not clear how the Council undertook its determination against the Pool Safety Standard, noting there was:

... no clear reference in the Council's enforcement notice to the QDC, part MP3.4.

and:

There is no evidence to suggest that the Council considered compliance with the relevant acceptable solution (being A1, which draws recourse to Australian Standard AS1926.1 and AS1926.2 as modified), and also – of any alternative solutions that comply with P1 (or is shown to be at least equivalent)."

Enforcement Notice

6. A new Enforcement Notice dated 1 October 2019 was issued by the Council to Mr TJK Edwards and Ms SL Edwards who are the owners of the subject property. The Notice was given pursuant to section 248 of the Building Act as Council considered the swimming pool to be dangerous. The Enforcement Notice required the owners to comply with the Pool Safety Standard under section 232 of the Building Act by Thursday, 31 October 2019.
7. The Enforcement Notice also states that the Pool Safety Standard is prescribed in section 231D of the Building Act and includes the Queensland Development Code (**QDC**) MP 3.4 Swimming Pool Barriers.
8. The Enforcement Notice listed the following actions required to make the pool comply with the Pool Safety Standard:
 - Ensure swimming pool barriers for outdoor swimming pools shall not permit direct access to the swimming pool area from a building or adjoining properties. (AS1926.2-2007).
 - Ensure the swimming pool barrier is at least 1200mm high. (AS1926.1- 2007) (QDC MP3.4).
 - Ensure all horizontal members are at least 900mm apart. (AS1926.1- 2007).
 - Ensure all swimming pool gates open outwards away from the swimming pool enclosure. (AS1926.1- 2007).
 - Ensure all gaps do not exceed 10mm to prevent the insertion of any implement. (AS1926.1- 2007).
 - Ensure the gate latch is protected for the effective radius of 450mm from the operating part of the latch. (AS1926.1- 2007).

- Ensure the return fencing does not allow access into the swimming pool enclosure. All footholds or gaps greater than 10mm must be protected. (AS1926.1- 2007).
9. Reference to AS1926.1-2007 is *Australian Standard - Swimming pool safety Part 1: Safety barriers for swimming pools* and AS1926.2-2007 is *Australian Standard - Swimming pool safety Part 2: Location of safety barriers for swimming pools*. Both Australian Standards are called up by QDC MP 3.4.

Swimming Pool Barrier Inspection Report

10. In addition a letter dated 1 October 2019 was also sent to the owners attaching a Swimming Pool Barrier Inspection Report. The Report listed in detail why the pool fencing did not comply with the Pool Safety Standard and what actions could be taken to make the pool compliant with the standard.
11. In summary, the Report identifies three issues with the pool fencing:
1. *Access to the non-compliant gate which leads to the pontoon*
This gate which leads to the pontoon is not compliant and can be accessed from either end of the deck – refer AS 1926.2-2007.
 2. *Side boundary fence*
The side boundary fence does not comply as horizontal members on the outside of the fence are less than 900 mm apart – refer section 2.3.4 of AS 1926.2-2007.
 3. *Access between the pool and canal shoreline*
Access between the pool and canal shoreline is through two non-compliant gates.
 - The inner swimming pool gate and adjacent pool fence is not 1200 mm high – refer section 2.1 of AS 1926.1-2007.
 - This gate does not swing outwards – refer section 2.5.1 of AS 1926.1-2007;
 - This gate's latch is not adequately shielded as the gap between gate and fencing elements exceeds 10 mm – refer section 2.5.4 of AS 1926.1-2007;
 - The outer swimming pool gate (installed to address non-compliance issues of the inner gate) opens directly onto an adjoining property (a canal) – refer section 4.2 of AS 1926.2-2007.

Grounds of Appeal

12. The Appellant's grounds of appeal are:

Numerous reasons relating to both incorrect interpretation and or inconsistent/ambiguous specification application of the codes in the enforcement notice (yet again, note Development Tribunal Decision 19-006 dated 17 July 2019). In addition we wish to have the new lower gate approved as a performant (sic.) solution which wasn't considered at the last Tribunal.

Hearing

13. At the hearing the Tribunal advised the appeal was about the issue of an Enforcement Notice by the Council. The Tribunal also advised to the effect that it did not have jurisdiction to grant a binding declaration approving the fence as being complaint with the Pool Safety Standard.

14. The Tribunal then examined each of the issues subject of the Enforcement Notice with the Appellant and Council representatives.

1. *Access to the non-compliant gate which leads to the pontoon*

At the hearing the Tribunal heard that the owner had addressed access to the non-compliant gate leading to the pontoon by installing a denial panel preventing access to the gate via the deck from the east of the property. Access from the other side was dependent on item 3 below.

2. *Side boundary fence*

The Tribunal agreed with Council that the side boundary fence was non-compliant as it could be climbed from the adjoining property. At the hearing the owner agreed to install a 60 degree "tee pee" style protection cover to the top of the block boundary wall for a distance of 900 mm back from the canal frontage. Given the complexity of the matter as raised by the Appellant in the grounds of appeal, the Tribunal agreed that the owner would ensure this work was completed within two weeks. This would also address any immediate risk of a child gaining access to the pool by climbing the fence from the neighbouring property.

3. *Access between the pool and canal shoreline*

While the gate opening onto the canal shoreline did not comply with the Pool Safety Standard as it opened onto an adjoining property, it addressed numerous other non-compliance issues associated with the inner gate and adjacent fencing. Therefore providing item 2 above was addressed, it could be argued that the pool no longer posed an immediate danger to young children.

The Tribunal noted that the deck and pool fencing of the subject property, and those of adjoining properties were built into the canal area. There was discussion at the hearing about whether the owner could seek approval under the performance provisions of the QDC for the gate to open outwards on these grounds. The process for obtaining approval was clearly explained to the owner by the Tribunal and Council representatives. In order to achieve this outcome the owner would need to:

- a) find a suitably qualified expert in pool safety to prepare an alternative solution in accordance with section 26 of the Building Act;
- b) lodge a building application for the gate with a certifier; and
- c) obtain approval from the Council to allow the gate to open onto tidal land. The Tribunal noted that approval had already been given to the owner for the deck and pool fencing to extend onto tidal land.

Again, given the complexity of the matter as raised in the grounds of appeal, the owner was provided with time to find a suitably qualified expert to prepare an alternative solution. Council was to advise the owner on how to make the necessary application to allow the gate to open onto the canal land.

Post Hearing

15. On 28 November 2019 the Council advised via the Registry that the application cost would be \$2,007 but did not provide any further information about how to make such an application.

16. On 5 December 2019 the Tribunal sent the following communication to the parties as discussed at the hearing:

Further to the onsite hearing at 34 Adaluma Avenue, Buddina on 27 November 2019, the tribunal understands that the parties have agreed to a process that would culminate in the Enforcement Notice and the appeal being withdrawn.

For the record (in case it assists the parties) the tribunal's understanding of agreed process is as follows:

1. The Appellant has until Thursday 19 December 2019 to install a 60 degree "tee pee" style protection cover to the top of the block boundary wall for a distance of 900 mm back from the canal frontage as discussed on site.

2. If item 1 above is completed to Council's satisfaction, the Council will withdraw the Enforcement Notice issued pursuant to section 248 of the Building Act 1975, as the pool fencing would no longer be considered by the Council to pose a danger to young children and in that event the appeal will be withdrawn by the Appellant.

3. The Council will notify the tribunal in due course (via the registry) of the outcome. If item 1 above is not completed to the Council's satisfaction, the Tribunal will proceed to decide the appeal about the Enforcement Notice.

4. For the record (and again, in case it assists the parties) the tribunal understands that the following further steps were agreed to between the parties relevant to the pool barrier:

a. Within three weeks, the Appellant will advise the Sunshine Coast Regional Council whether the Appellant is able to find a suitable expert to prepare an alternative solution which meets the performance requirements of the Queensland Development Code MP 3.4 Swimming Pool Barriers addressing clause 4.2 of Australian Standard 1926.2-2007 in respect of direct access to the swimming pool area from the adjacent canal area.

b. The Council will provide information to the Appellant about making a development application for operational work which would allow the gate to swing onto the canal area.

c. If the Appellant is able to find a suitable expert as mentioned in item (a) above, the Appellant will:

(i) lodge an application for operational works with the Council to allow the pool gate to open onto the canal area; and

(ii) if successful, lodge a building application for the gate with the above-mentioned alternative solution for approval with a building certifier.

5. The tribunal notes that if reasonable progress is not made to obtain the necessary approvals mentioned in item (c) above, the Council may recommence show cause and enforcement action under the Building Act 1975.

17. On 5 December 2019 the Council emailed comments about the tribunal's communication which in summary stated:

- Council will only withdraw the Enforcement Notice once the pool fence complies with the Pool Safety Standard. This includes the lower pool gate that Council considers non-compliant due to it opening onto an adjoining property.
- Council will notify the Tribunal when the side boundary fence was made compliant.

- The Tribunal should clarify whether it is lawful to have a gate swinging out into an adjoining property.
- Council advised it will notify the appellant about the costs and process to obtain an operational works approval but this is dependent on whether the Tribunal is of the opinion that a pool gate can open onto an adjoining property.

18. On 18 December 2019 the Appellant responded to Council's email of 28 November and advised as follows:

Thanks for the information in your email today. As highlighted by Peter from the Council I would also appreciate direction from the Tribunal regarding the gate swinging out onto an adjoining property, before proceeding with permitting applications through Council.

I can confirm that my neighbour has, or is about to, install the 'protection cover' on their property.

Please note that I am travelling overseas with my family for a month from Friday, so will not be able to progress this matter further until my return in late January 2020.

19. On 20 December 2019 the Tribunal, concerned that the Appellant may not meet the agreed timelines, advised as follows:

In an email dated Wednesday 18 December 2019 (copy below), the Appellant has advised that from Friday 20 December 2019 (today), he will be overseas for a month. It is now apparent to the Tribunal that all the actions detailed in the Tribunal's directions of Thursday 5 December 2019 will not be completed within the agreed timeframes. The Tribunal will therefore proceed to determine the appeal.

Until the Tribunal has made its decision, the Tribunal directs under s250 of the Planning Act 2016, that:

1. *The Appellant immediately lock the gate adjacent to the canal; and*
 2. *If the gate is not locked by the Appellant, the Council take any necessary action to ensure the gate is and remains locked until the Tribunal's decision is issued.*
- Point 2 above applies whether or not this email comes to the Appellant's attention before he departs for overseas.*

20. On 13 January the Tribunal wrote to Council seeking confirmation that installation of a denial panel had addressed item SPFC41 in the Enforcement Notice by preventing access to the swimming pool enclosure from the deck on the east side. The Tribunal also questioned whether access via the gangway was compliant with the Pool Safety Standard and if it considered this gate was also non-compliant as it opened onto an adjoining property.

21. The Council did not respond to the question about the denial panel, however noted that access could still be obtained via the neighbour's fence on the west side where the owner agreed that a "tee pee" cover would be installed.

22. In response to whether the gangway provided access to the pool, the Council advised that:

The gangway gate is not the subject of the appeal. (The gangway gate doesn't form part of the pool safety barrier. The pontoon, gangway and deck (over water) are intended to be protected from access by young children via water exceeding 300 mm, a non-climbable gangway and non-climbable shielding to prevent access to these items and areas. The gangway gate is not located on the same allotment as the pool.

Jurisdiction:

1. The Enforcement Notice was issued under section 248 of the Building Act. Under section 248(5), the Enforcement Notices is taken to be given under the section 168 of the Planning Act.
2. Section 250 of the Building Act states that a person who is given an Enforcement Notice under section 248 may appeal to a development Tribunal as if the appeal were an appeal under the Planning Act.
3. Under section 1(2) of schedule 1 of the Planning Act, table 1 only applies for a Tribunal if one of the preconditions in section 1(2) is satisfied. In this case, section 1(2)(h)((i) is indeed satisfied because the decision to give an Enforcement Notice in this instance was in relation to a matter under paragraph (g) of section 1(2), being a matter relating to the Building Act.
4. Table 1 of schedule 1 according applies for a Tribunal and item 6 of table 1 states that an appeal may be made against a decision to give an Enforcement Notice.

Decision Framework:

1. The Council must establish that the appeal should be dismissed (section 253(3) of the Planning Act).
2. 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).
3. 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).
4. 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:

- I. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunal's Registrar on 8 October 2019.
- II. Enforcement Notice issued by Sunshine Coast Regional Council dated 1 October 2019 issued to Mr TJK Edwards and Ms SL Edwards requiring compliance with the Pool Safety Standard.
- III. Covering letter and Swimming Pool Barrier Inspection Report prepared by Sunshine Coast Regional Council dated 1 October 2019 sent to Mr TJK Edwards and Ms SL Edwards describing why the pool fence was non-compliant and what needed to be done to make it compliant.
- IV. Development Tribunal Decision Notice 19-006 dated 17 July 2019 involving Timothy John Kenneth Edwards as the Appellant and Sunshine Coast Regional Council as the Assessment Manager.

- V. Email advice received from Sunshine Coast Regional Council dated 28 November 2019 regarding legislative provisions about swimming pools on separate lots and making an application for a gate to swing onto a tidal waterway.
- VI. Email questions from Sunshine Coast Regional Council dated 5 December 2019.
- VII. Email advice from the Appellant dated 19 December 2019.
- VIII. Email response from Council dated 13 January 2020.

Findings of Fact:

Pool Safety Standard

1. The side boundary fence does not comply as horizontal members on the outside of the fence are less than 900 mm apart – refer section 2.3.4 of AS 1926.2-2007.
2. Access between the pool and canal shoreline is through two non-compliant gates.
 - The inner swimming pool gate and adjacent pool fence is not 1200 mm high – refer section 2.1 of AS 1926.1-2007.
 - This gate does not swing outwards – refer section 2.5.1 of AS 1926.1-2007;
 - This gate's latch is not adequately shielded as the gap between gate and fencing elements exceeds 10 mm – refer section 2.5.4 of AS 1926.1-2007;
 - The outer swimming pool gate (installed to address non-compliance issues of the inner gate) opens directly onto an adjoining property (the canal) – refer section 4.2 of AS 1926.2-2007.
3. The Tribunal is also of the view that the pontoon gate may not be compliant with Item 17 Schedule 1 of the QDC MP 3.4 as the gangway provides access from a pontoon.

Tribunal Communication

The Appellant was provided with the following deadlines:

4. Thursday 19 December 2019 to install a 60 degree "tee pee" style protection cover to the top of the block boundary wall for a distance of 900 mm back from the canal frontage as discussed on site.
5. On 18 December the Appellant advised that this was to be done by the neighbour and that they would not be able to progress this matter further until their return in late January 2020.
6. As of the date of this decision the Tribunal has not been advised that this work has been completed.
7. Three weeks to advise Council if they are able to find a suitable expert to prepare an alternative solution which meets the performance requirements of the QDC MP 3.4 Swimming Pool Barriers addressing clause 4.2 of Australian Standard 1926.2-2007 in respect of direct access to the swimming pool area from the adjacent canal area.

As of the date of this decision the Tribunal has not received any indication that a suitable expert has been found to prepare an alternative solution.

Performance Solution

8. Both the Appellant and Council are seeking a decision from the Tribunal about allowing the pool gate to swing onto the canal area. As advised at the hearing and subsequent communication, this is not within the jurisdiction of the Tribunal. The appeal relates solely to the issue of an Enforcement Notice by the Council.

Reasons for the Decision:

1. The Enforcement Notice did not clearly state why the pool fencing did not comply with the Pool Safety Standard as it needs to be read in conjunction with the Swimming Pool Barrier Inspection Report. The Tribunal was sympathetic with the Appellant's grounds of appeal to the extent the matter is complex, and so provided further time for compliance and possibly finding a performance solution in respect of the lower gate. The Appellant did not meet the deadlines provided by the Tribunal to address noncompliance with the Pool Safety Standard.
2. The Tribunal does not have jurisdiction to approve an alternative solution for the fencing. The appeal relates solely to the issue of an Enforcement Notice.
3. The Council was able to establish that the swimming pool barrier does not comply with the Pool Safety Standard and in particular that the barrier did not comply at the time of the Council's issuing of the Enforcement Notice. The Council established to the Tribunal's satisfaction that the Enforcement Notice was properly issued in the circumstances.
4. The Development Tribunal (**Tribunal**), in accordance with section 254(2)(a) of the Planning Act confirms the decision of Council to issue the Enforcement notice.

Ain Kuru

Development Tribunal Chair
Date: 24 January 2020

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:

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