



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	21-060
Appellant:	Leslie Proud
Respondent	Grant Prince
Site Address:	2/9 South Quay Drive Biggera Waters QLD 4216

Appeal

Appeal by the owner of a residential swimming pool owner under section 246AO of the *Building Act 1975* (BA) against the decision by a pool safety inspector to give a nonconformity notice (Form 26) for the pool to the owner under section 246AB of the BA.

Date and time of hearing:	24 January 2022 at 11:00am
Place of hearing:	Online – Via Teams Meeting
Tribunal:	James Dunstan – Chair Kylie Rojahn – Member
Present	Leslie Proud – Appellant

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA) **confirms** the decision of the Respondent, Pool Safety Inspector, to issue the nonconformity notice (Form 26) dated 21 October 2021.

Background:

The subject land is located at 2/9 South Quay Drive Biggera Waters QLD 4216, Lot 2 SP213533

The subject site is part a Duplex dwelling (class 1a). Each dwelling (Unit 1 and 2) has a swimming pool for exclusive use located on the common property at the rear.

On 21 October 2021, the Respondent, being a licensed Pool Safety Inspector, inspected the pool barrier and issued a Form 26 nonconformity notice on the following grounds:

- There is no fence on the lower section of the property;
- The gate latch post is not 1200mm high

The notice advised that to achieve compliance the following steps were to be undertaken:

- Install a compliant barrier that is 900mm away from the pontoon handrail;
- Polycarbonate piece to fill the void

Prior to the hearing, a site inspection was undertaken by the tribunal members to inspect and review the site. This inspection occurred at 10am on 17 December 2021.

During the site inspection, the tribunal observed the site and the pool area subject to this appeal, backing onto the tidal canal at the rear.

Unit 2 does not have a fence erected along the rear boundary to the canal and relies on the canal as part of the pool barrier.

There is a shared use pontoon located at the rear that is accessible by both unit 1 and unit 2 and is not exclusive use. This has been confirmed in writing by the appellant in his email dated 5 January 2022.

Following the site inspection an online hearing was held via Microsoft Teams. The respondent did not see a need to attend, so verbal evidence was provided from the appellant which was in support of the written submissions already made.

The appellant made it clear during the hearing that he believed that the shared pontoon was not relevant as the neighboring unit 1 has a pool with a barrier.

Jurisdiction:

The Tribunal has jurisdiction to hear the appeal under section 229 and Schedule 1, Section 1, Table 3, Item 3(a), of the PA, and section 246AO of the BA, as the appeal is against the nonconformity notice issued by the Pool Safety Inspector and the nonconformity notice included an information notice as required under section 246AB(5) of the BA.

Decision Framework:

Under section 253(2) of the PA, the appellant must establish the appeal should be upheld.

Under section 235(4) of the PA, the Tribunal must hear and decide the appeal by way of a reconsideration of the evidence that was before the person who made the decision appealed against. The Tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the Tribunal or any information provided under s.246 of the PA (pursuant to which the registrar may require information for tribunal proceedings).

The Tribunal is required to decide the appeal in one of the ways mentioned in s.254(2) of the PA.

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 Tribunals Registrar on 25 October 2021
2. The application material including the Form 26 nonconformity notice dated 21 October 2021.
3. Written submissions by the appellant submitted with the Form 10
4. Further email submissions from the appellant dated 5 January 2022 and 24 January 2022 submitted pre and post hearing

5. Oral submissions made by the Appellant during the hearing
6. The *Planning Act* 2016 (PA).
7. The Building Act 1975 (BA)
8. The Building Regulation 2021 (BR)
9. Queensland Development Code, Mandatory Part 3.4 – Swimming Pool Barriers (QDC MP 3.4)
10. Australian Standard 1926.1-2007 Amendment 1, Swimming Pool Safety – Part 1: Safety Barriers for swimming pools as referenced in QDC MP 3.4
11. Australian Standard 1926.2-2007 Amendment 1, Swimming Pool Safety – Part 2: Location of safety barriers for swimming pools as referenced in QDC MP 3.4
12. Building and Development Tribunal – Decision 03-06-027 dated 23 March 2006
13. Building and Development Tribunal – Decision 03-05-025 dated 5 September 2005

Findings of Fact:

The Tribunal makes the following findings of fact:

1. The subject site is part of a duplex development with common property adjoining a canal at the rear.
2. The allotment contains a duplex (Unit 2) with a private use swimming pool located on the common property.
3. The subject site is regulated land as defined under s231A of the BA.
4. The swimming pool barrier subject to the appeal is deemed to be a non-shared, regulated pool as defined under s231A and s231B of the BA.
5. The swimming pool is defined as an Outdoor Pool for the purposes of AS1926 Part 1 & 2.
6. The First item raised on the nonconformity notice is with regards to there not being not fence to the lower section of the property. As identified onsite, the lower section, being the canal does not have a barrier installed.
7. As identified onsite by the tribunal, the barrier to the canal consists of a 900mm wide section of fencing that is 1200mm in height. This panel is Perspex covered to the outer face to prevent a foothold/handhold being obtained to shimmy around from the adjoining property. This part of the barrier is adjoining the boundary with number 7. There was no other barrier that was identified by the Tribunal to the canal for the remainder of unit 2 and to the common use pontoon with unit 1. The tribunal identified this panel adjoining number 7, has a large gap between the perpendicular 900mm wide perspex fence panel and the barrier block wall running along the boundary between 7 and 9. This gap was measured to a width of 120mm.
8. This gap between elements of the barrier to this boundary exceeds 100mm and therefore is does not comply with AS1926.1-2007 clause 2.3.7 for vertical members. This clause states: "*the clear space between any adjacent vertical members (see figure 2.2) such as palings, rods or wires, shall not exceed 100mm at any point*".

9. The Tribunal reviewed the canal at the rear of the property, and subject to the requirements of QDC MP3.4 may be considered an effective barrier, where it is provided with a barrier intersecting at the body of water and where there is no access provided over or under the body of water (QDC MP 3.4 Schedule 1, item 17) from an adjoining property.
10. As identified onsite by the Tribunal, and confirmed by the appellant in writing, the pontoon located at the rear of the property is not exclusive use, but a shared use pontoon for the residents of Unit 1 and Unit 2. This is connected at the intersecting boundary of Unit 1 and 2 for their private use space. This pontoon provides direct connection between unit 1 and unit 2 rear private use areas. There is no barrier between unit 2 pool area and the pontoon
11. Acceptable Solution A1 of QDC MP 3.4, as the applicable assessment benchmark, requires that pool barriers must comply with the Standard, which is defined under QDC MP 3.4 as AS1926.1-2007 amendment 1 and AS1926.2-2007 amendment 1 except as varied by schedule 1.
12. Clause 4.2 of AS1926.2-2007, which is not varied by QDC MP 3.4, states: *“Barriers for outdoor pools shall not permit direct access to the pool area from the building or adjoining properties”*.
13. For the purposes of interpreting this clause, Unit 1, its private use rear area and its access to the common property, being shared and not exclusive use, is considered to be an adjoining property. This determination is based on it being owned and occupied by a separate household on a separate title and does not have access rights to the swimming pool for Unit 2 as a shared pool.
14. There is no barrier separating the common property and shared access pontoon from the pool enclosure and therefore it does not satisfy the requirements of AS1926.2-2007, Clause 4.2.
15. Further to the requirements of AS1926.2-2007, QDC MP 3.4 schedule 1, item 17(c) regarding use of a canal or body of water as a barrier states that *“access is not available to the pool over or under the body of water (see figure 20,21a and 22b)”*. The pontoon provides direct access over the canal being used as a barrier from Unit 1 to Unit 2.
16. QDC MP 3.4, Schedule, item 17(d) and (e) provide as follows
“(d) Required barriers intersecting the body of water, either
(i) extend to the edge of the water and either overhangs the water by 900 millimeters; or
(ii) return 900 millimeters along the edge of the water in at least one direction (see figure 19) and
(e) the overhang of return fence required by 17(d) must have a surface that does not provide any projection or indentation forming a handhold or foothold that would aid climbing”

It was identified during the site inspection, and from photos provided to the tribunal, that at this point of shared access, there is no intersecting barrier to the canal. There is no return barrier and the pontoon itself would facilitate climbing and a handhold.

17. The second item raised in the nonconformity notice is considered by the tribunal to be non-compliant with the relevant Standard, AS1926 part 1 and QDC MP 3.4. This is due to the location of the latching device not being shielded to a height of 1200mm above ground level. This reduction in the barrier height at this post reduces the effective height of the barrier for a person to reach over. Figure 2.6(e) of AS1926.1-2007 requires that the bottom of a handhole or similar is not less than 1200mm above finished ground for a shielded latching device. In this case, it is only 1100mm. Therefore, although the latching device is more than 150mm below this point, it is considered the barrier is breached.

Reasons for the Decision:

The Tribunal has determined for the first item in the nonconformity notice that the pool barrier being the rear canal, in its current form does not comply with QDC MP 3.4 and the Standard as required. The canal, whilst being considered to be an effective barrier in its own right, is breached by the shared use pontoon, which connects both Unit 1 and Unit 2 private use areas together, allowing direct access from unit 1 to the pool without having to pass through a barrier.

The canal, as a permanent body of water can be considered a compliant barrier under QDC MP 3.4 Schedule 1, item 17 subject to compliance. In the case of the subject site, It is determined by the Tribunal that there is non-compliance with AS1926.1-2007 as the barrier permits direct access from Unit 1, and QDC MP 3.4 Schedule 1, items 17(c), 17(d) and 17(e) as there is no intersecting barrier present and the pontoon provides direct access over the water body.

The appellant in his written submissions and raised briefly during the hearing discussed previous development tribunal decisions regarding canal barriers and access. These decisions were from 2005 and 2006.

The tribunal in reviewing these past decisions, considers that as they are not relevant for this appeal as they were made prior to QDC MP 3.4 being adopted, and against superseded versions of the relevant Standard (AS1926 Part 1 & 2). The adoption of QDC and updates to the standard have changed the compliance requirements significantly since these decisions were made.

The Tribunal has determined for the second item in the nonconformity notice, that there is non-compliance with AS1926.1-2007 and QDC MP 3.4 as it does not provide a minimum 1200mm height for which to reach over the barrier to the shielded latch.

Therefore, the Tribunal **Confirms** the nonconformity notice (Form 26) dated 21 October 2021 issued by the Respondent for both items raised as non-compliant.

James Dunstan

Development Tribunal Chair
Date: 9 February 2022

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

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- (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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