



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal Number:	23-061
Appellant:	Jacob Monaghan
Respondent:	Townsville City Council
Site Address:	6 Edinburgh Court, Castle Hill Qld 4810 and described as Lot 11 on T118510

Appeal

Appeal under section 229 and schedule 1, section 1(5), table 3, item 3(a) of the *Planning Act 2016* against a decision under section 245B(1)(b) of the *Building Act 1975* to refuse to grant an exemption from complying with a part of the pool safety standard relating to barriers for a regulated pool.

Date and time of hearing:	14:00-14:30 17 January 2024
Place of hearing:	Online, via Teams
Tribunal:	Stuart Smith – Chairperson Ms Kylie Rojahn – Referee
Present:	Jacob Monaghan – Appellant Brent Young – Townsville City Council – Liaison Officer Macey Riley – Townsville City Council Daniel Lickorish – Townsville City Council

Decision:

The Development Tribunal (tribunal), in accordance with section 254(2)(a) of the *Planning Act 2016* (PA) confirms the decision of the Respondent.

Background

1. The subject site is 6 Edinburgh Court, Castle Hill. Located on the subject site is a regulated pool as defined in section 231B of the *Building Act 1975* (BA).
2. On 25 September 2023, an application for exemption from compliance with part of the pool safety standard on the basis of impracticality under section 245(1) of the BA was lodged with Townsville City Council (Council) by the appellant on behalf of the property owner.

3. The part of the pool safety standard, from which exemption was sought, was the prohibition on direct access to a pool from a class 1 building under standard modification 27 of Queensland Development Code mandatory part 3.4.
4. Following receipt of the application, Council officers attended the site for inspection.
5. On 6 November 2023, a decision notice to the appellant was issued refusing the requested exemption. Within the decision notice Council provided the following reasons for decision:

Council considers the plan which forms part of BP22/1694, which depicts a new glass pool fence, as a possible alternate means of complying with MP3.4.

Council considers there is sufficient room from the dwelling to the pool edge for installation of a pool barrier and gate, which should not affect the building, ...;

6. On 15 November 2023, the appellant filed a Form 10 Notice of Appeal/Application for Declaration. In this Notice of Appeal, the appellant stated that the two available configurations for installing a compliant gate between the pool enclosure and the house would be impracticable, submitting that the only practicable solution was a child-resistant doorset.

The Appellant's submissions

7. The following submissions were made by the appellant:
 - a. The appellant advised an exemption is being sought as the property owner had concerns that installation of a compliant barrier would impact usage because of the limited circulation space around the swimming pool. The owners are concerned that entry and exit will require circulation through two gates, which is an inconvenience to patrons.
 - b. Installation of a fence would be impracticable in the owner's opinion because multiple gates will be required to allow for entry/exit of other areas of the property including access between the front and rear of the property.
 - c. The appellant retracted his written submission that the pool could be considered an 'indoor pool'. The appellant conceded that the definition of an 'indoor pool' does not apply at this property.
 - d. The appellant confirmed access to the pool is available via a ramp situated at the front of the property or via the rear yard with installation of a gate. The appellant stated this is not the preferred solution of the owners.

Council's submissions

8. Council made the following submissions:
 - a. The Council Liaison Officer asserted that the decision notice should be upheld.
 - b. Council provided alternative methods of fencing the existing pool that comply with the pool safety standard.

Jurisdiction

9. The tribunal is satisfied that it has jurisdiction to hear this appeal having regard to the PA section 229(1) and schedule 1. The matter involves an application for exemption

from the pool safety standard on the basis of impracticality under section 245 of the BA.

10. The tribunal is satisfied that it has jurisdiction to hear the appeal under section 229 and schedule 1, section 1(5), table 3, item 3(a) of the PA.

Decision framework

11. The tribunal notes that:
 - a. The onus rests on the appellant to establish that the appeal should be upheld (s253(2) of the PA);
 - b. 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 (s253(4) of the PA);
 - c. The tribunal may nevertheless (but need not) consider other evidence presented by a party with leave of the tribunal or any information provided under s246 of the PA (pursuant to which the registrar may require information for tribunal proceedings); and
 - d. The tribunal is required to decide the appeal in one of the ways mentioned in s254(2) of the PA.
12. The decision under appeal was made by Council under section 245B(1)(b) of the BA. Act 1975. Section 245B relevantly provides:

- (1) *The local government must consider the application and decide to—*
 - (a) *grant the exemption; or*
 - (b) *refuse to grant the exemption.*
- (2) *In deciding the application, the local government may consider the following—*
 - (a) *whether compliance with the part of the pool safety standard may require the owner to—*
 - (i) *move or demolish a building or part of a building; or*
 - (ii) *change the location or size of the regulated pool; or*
 - (iii) *remove vegetation protected from removal under an Act or a local law;*
 - (b) *the cost of the barriers or work required to ensure the pool complies with the part of the pool safety standard, having regard to the nature of any existing barriers for the pool;*
 - (c) *other matters the local government considers relevant.*
- (3) *The local government may grant the exemption on the reasonable conditions it considers necessary or desirable to prevent a young child accessing the pool.*
- (4) (...)
- (5) *The local government may only exempt a person from complying with a part of the pool safety standard to the extent reasonably necessary in the circumstances to overcome the impracticality associated with compliance with the part.*
- (6) (...)

Materials considered

13. The following materials have been considered:
 - a. Decision notice of Townsville City Council dated 6 November 2023
 - b. Form 10 Notice of Appeal/Application for Declaration dated 13 November 2023

Findings of fact

14. The tribunal makes the following findings of fact:
- a. The subject site at 6 Edinburgh Court Castle Hill has recently had a number of renovations made.
 - b. The pool is an existing structure.
 - c. The notice of appeal relates to compliance requirements of access to a swimming pool from a class 1 building.
 - d. The application was seeking an exemption from compliance with part of the pool safety standard for impracticality reasons under section 245 of the BA.
 - e. On application, the building type was disputed with the appellant indicating the existing structure could be classified as an 'indoor swimming pool' that would allow for entry to the pool via an internal door. At the time of hearing, the appellant conceded the pool can no longer be classified as an indoor pool.
 - f. The appellant was issued a decision notice that the application for exemption was refused. The appellant submitted the installation of a compliant fence and gate would be an inconvenience to the owners and the tribunal acknowledges this and that complying with the pool safety standard is not the owner's preferred option.
 - g. There was no evidence provided to indicate that complying with the pool safety standard would be impracticable. In particular, there was no evidence demonstrating that complying with the pool safety standard would require the owner to:
 - (i) move or demolish a building or part of a building; or
 - (ii) change the location or size of the regulated pool; or
 - (iii) remove vegetation protected from removal under an Act or a local law.
 - h. There was also no evidence put before the tribunal that the cost of the barriers or work required to ensure the pool complies with the pool safety standard would support the granting of an exemption.

Reasons for the decision

15. Based on all the evidence and submissions, the tribunal is satisfied that the decision notice dated 6 November 2023 from Townsville City Council should have been issued.
16. The Tribunal is satisfied that the exemption sought is not justified based on the matters to which regard may be had under section 245B(2) of the BA.

Stuart Smith
Development Tribunal Chair

Date: 8 March 2024

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:

The Registrar of Development Tribunals
Department of Housing, Local Government, Planning and Public Works
GPO Box 2457
Brisbane Qld 4001

Telephone (07) 1800 804 833

Email: registrar@epw.qld.gov.au