



Development Tribunal – Decision Notice

Planning Act 2016, section 255

Appeal number:	23-009
Appellant:	Joshua Charles Harrison
Respondent	Sunshine Coast Regional Council (Council)
Site address:	16 Satinbird Place Bokarina 4575 and described as Lot 197 on B 96010 – 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 on 2 March 2023 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:	Tuesday, 15 August 2023 at 10:30 am
Place of hearing:	The subject site
Tribunal:	Don Grehan – Chair Rebecca Moore – Member
Present:	Karina Harrison – Appellant’s Representative John Harrison – Appellant’s Representative Natalie Trippick – Appellant’s Representative Peter Chamberlain – Council Representative Roslyn McDermott – Council Representative

Decision:

The Development Tribunal (Tribunal), in accordance with section 254(2)(b) of the *Planning Act 2016* **changes** the decision of Council to issue the enforcement notice dated 2 March 2023 to a decision to issue a notice in the same form except that the requirements identified in the notice as SPFC001 read instead as follows:

- SPFC001:** The Appellant must do all things necessary to:
- (a) Obtain a Building Development Approval from a Building Certifier to install a complying pool barrier prohibiting access to the pool and the immediate pool surrounds from the sanitary compartment located within the Class 1a Dwelling; **or**
 - (b) Obtain a Building Development Approval from a Building Certifier to change the classification of the sanitary compartment to become a Class

10 part appurtenant to the Class 1a Dwelling whereby access to the pool and the immediate pool surrounds is not prohibited; **and**

- (c) Obtain a Form 17 Final Inspection Certificate from a Building Certifier; by no later than 4pm Friday the 1st of December 2023.

Additionally, the Tribunal notes that at the date and time of the hearing, the remaining compliance requisitions of the Enforcement Notice, referenced as SPFC005, had been remedied.

Background

1. The Appellant, engaged a Pool Safety Inspector to obtain a Pool Safety Certificate prior to renewal of a rental lease agreement for the dwelling on the subject site.
2. Despite the swimming pool previously having held a Pool Safety Certificate, the Pool Safety Inspector, being unfamiliar with the premises, had concerns in relation to the access to the pool and the immediate pool surrounds from a sanitary compartment located within the dwelling and sort advice from Council as to compliance or otherwise of the circumstances.
3. In response to the request for advice, Council conducted a compliance inspection of the swimming pool barrier at the subject site on 1 March 2023 and, being of the view that the circumstances relating to access from sanitary compartment and other things were non-compliant, issued an enforcement notice to the Appellant on 2 March 2023 requiring rectification works to secure access to the swimming pool.
4. The Appellant believes that access to the pool and the immediate pool surrounds from the sanitary compartment does not pose a risk to young children given that the only way into or out of the toilet facilities is from within the pool enclosure and that reclassification sanitary facilities is a procedural matter that logically cannot affect pool safety.
5. The Appellant, dissatisfied with Council's decision to issue the enforcement notice lodged an appeal with the Development Tribunal registry on 6 March 2023.

Jurisdiction

6. The enforcement notice was issued under section 248 of the Building Act. Under section 248(5), the enforcement notice is taken to be given under the section 168 of the Planning Act.
7. 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.
8. 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.
9. 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

10. The Council must establish that the appeal should be dismissed (section 253(3) of the Planning Act).
11. 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).
12. 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).
13. The Tribunal is required to decide this appeal in one of the ways identified in section 254(2) of the Planning Act.

Material considered

14. The material considered in arriving at this decision comprises:
 - (a) 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar on 6 March 2023
 - (b) Enforcement Notice Reference No. COM23/0306 dated 2 March 2023 issued by Sunshine Coast Regional Council
 - (c) The *Planning Act 2016 (PA)*
 - (d) The *Planning Regulation 2017 (PR)*
 - (e) The *Building Act 1975 (BA)*
 - (f) The *Building Regulation 2021 (BR)*
 - (g) National Construction Code 2022 Volume Two - Building Code of Australia Class 1 and 10 buildings (NCC)
 - (h) AS 1926.1 – 2007, Amendment 1, Swimming pool safety, Part 1: Safety barriers for swimming pools. (AS 1926.1 – 2007)
 - (i) AS 1926.2 – 2007, Amendment 1, Swimming pool safety, Part 2: Location of safety barriers for swimming pools. (AS 1926.2 – 2007)
 - (j) Queensland Development Code Mandatory Part 3.4 – Swimming Pool Barriers (QDC MP 3.4)
 - (k) Written submission from the Appellant dated 02 March 2023
 - (l) Verbal submissions from the Appellant's representatives at the hearing.
 - (m) Verbal submissions from Council's representatives at the hearing.
 - (n) The Queensland pool safety register.

Findings of fact

15. The tribunal makes the following finding of fact:
- (a) The subject site is a 630m² allotment situated on the western side of Satinbird Place Bokarina in an established residential area. A dwelling, attached garage and outdoor living area is located on the site and an inground swimming pool is situated to the rear of the dwelling in the north west corner of the allotment.
 - (b) The dwelling, attached garage, outdoor living area and inground swimming pool were constructed circa 1990 and pre-date the introduction of the Form 21 Final Inspection Certificate for Class 1a and 10 Buildings and Structures and the Form 17 Final Inspection Certificate, Swimming Pools/ Swimming Pool Fences.
 - (c) The Appellant, engaged a Pool Safety Inspector to obtain a Pool Safety Certificate prior to renewal of a rental lease agreement for the dwelling.
 - (d) Despite the swimming pool previously having held a Pool Safety Certificate, the Pool Safety Inspector, being unfamiliar with the premises, had concerns in relation to the access to the pool and the immediate pool surrounds from a sanitary compartment located within the dwelling and sort advice from Council as to compliance or otherwise of the circumstances.
 - (e) In response to the request for advice, Council conducted a compliance inspection of the swimming pool barrier at the subject site on 1 March 2023 and, being of the view that the circumstances relating to access from sanitary compartment and other things were non-compliant, issued Enforcement Notice Ref. No. COM23/0306 to the Appellant on 2 March 2023 requiring subsequent rectification works to secure access to the swimming pool.
 - (f) A sanitary compartment, comprised of a toilet pan, cistern and wash basin, is constructed in the northwest corner of the dwelling. The door serving the sanitary compartment opens directly into the pool enclosure however there is no thoroughfare access to facilities from the remainder of the Class 1a dwelling.
 - (g) There is no specific evidence as to the formal assigning of classification of the dwelling or the subject sanitary compartment pursuant to Part A6 of the NCC.
 - (h) A6G1(1) of the NCC confirms that the classification of a building or part of a building is determined by the purpose for which it is designed, constructed or adapted to be used.
 - (i) Part A6G1(2) of the NCC confirms that each part of a building must be classified according to its purpose and comply with all the appropriate requirements for its classification.
 - (j) Part A6 of the NCC provides an exemption to Part A6G1(1) which allows that, where a part of a building has been designed, constructed or adapted for a different purpose to the remainder of storey, and is less than 10% of the floor area of that storey, the classification applicable to majority of the storey may apply to the minor part.
 - (k) Safety barriers and their acceptable locations are prescribed by AS 1926.1 – 2007 and AS 1926.2 – 2007 referred to, for the purpose of the QDC MP3.4, as the *Standard*. The application of both AS 1926.1 – 2007 and AS 1926.2 – 2007 is varied by QDC MP 3.4.

- (l) QDC MP3.4 is a performance-based document that seeks to safeguard young children from drowning or injury in regulated pools. It provides both Performance Requirements and Acceptable solutions which are deemed to satisfy the relevant performance requirement.
- (m) The relevant performance requirement of QDC MP3.4 is P1(c) which states:
Swimming pools must have a barrier which restricts the access of young children to the pool and the immediate pool surrounds, including access from class 1, 2 or 3 buildings or class 4 parts of buildings located within or outside the pool area.
- (n) The corresponding Acceptable Solution of QDC MP3.4 is A1(a) which states:
“Swimming pools must have a barrier complying with the Standard, subject to the modifications to the Standard specified in schedule 1”
- (o) Section 29 of Schedule 1 of QDC MP 3.4 varies Clause 4.1 and Figure 2.1 of AS 1926.2 – 2007, Amendment 1 and confirms that:
“Access of young children to the pool and the immediate pool surrounds from a class 1, 2 or 3 building or class 4 part of a building located within the pool area must be restricted by a barrier complying with this part, unless the building is a patio, pergola, verandah, deck, balcony or the like (of any class) with at least one permanently open side and access is via a compliant barrier.”
- (p) The Appellant contends that access to the pool and the immediate pool surrounds from the sanitary compartment does not pose a risk to young children given that the only way into or out of the toilet facilities is from within the pool enclosure and that reclassification sanitary facilities is a procedural matter that logically cannot affect pool safety.

Reasons for the decision

16. The Tribunal is satisfied that the floor area of the sanitary compartment comprises less than 10% of the total floor area of the storey in which it is located and, in the absence of any formal documentation allocating an individual classification pursuant to Parts A6G1(1) and A6G1(2) of the NCC, the sanitary compartment holds a Class 1 classification as applicable to the remainder of dwelling.
17. Both Performance Requirement P1(c) and Acceptable Solution A1(a) of QDC MP3.4 require the provision of a barrier to restrict the access of young children to the pool and the immediate pool surrounds from within Class 1 building regardless of the means of access through or too the subject building.
18. While acknowledging reasoning of the Appellant contentions, the Tribunal notes it is obligated to decide the proceedings based on the laws in effect when application or request was made and that such obligation extend to the Local Government and Pool Safety Inspector.

Don Grehan
Development Tribunal Chair

Date: 2 November 2023

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 Energy and Public Works
GPO Box 2457
Brisbane QLD 4001

Telephone (07) 1800 804 833

Email: registrar@epw.qld.gov.au