



APPEAL
Integrated Planning Act 1997

File No. 3/02/044

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Brisbane City Council

Site Address: 11 Quarry Street Hamilton

Nature of Appeal

Appeal under section 20 of the Building Act 1975 against the decision of the Brisbane City Council to refuse an application for an exemption relating to swimming pool fencing on land described as Lot 12 on RP N0 58441 at 11 Quarry Street, Hamilton.

Date and Place of Hearing: 3.00 pm Friday 29 November 2002
11 Quarry Street Hamilton.

Tribunal: L F Blumkie

Present:

Applicant / Owner	
Mr S Rowe	- Architectural Ironworks - adviser to applicant
Mr A Everett	- ABCC Certifiers – adviser to applicant
Mr G Johnsen	- Brisbane City Council representative
Mr L Blumkie	- Tribunal Referee

Decision

In accordance with Section 4.2.34(1) of the Integrated Planning Act 1997 I **confirm** the decision by the Brisbane City Council dated 4 November 2002, File Ref: DRS/BLD/A02-1196051, not to grant an exemption for swimming pool fencing in respect of the pool situated at 11 Quarry Street Hamilton, subject to the following conditions:-

- (1) The pool is to be fenced in accordance with the requirements of the Building Act 1975 and Australian Standard AS 1926.1 within 20 business days of the applicant receiving this decision; and
- (2) The owner is responsible for keeping all windows and doors, which provide direct access from the dwelling to the pool area locked (and the key located in a safe place out of the reach of young children), while the pool is filled with water to a depth greater than 300mm and until condition (1) is satisfied.

Background

- (1) A new dwelling and swimming pool structure has been constructed on the property.
- (2) Australian Building Code Certification (ABCC) approved the swimming pool structure on 20 September 2001.
- (3) The approved drawings included a pool fence barrier surrounding the pool and separating the lower level of the dwelling from the pool. This separation was located in line with the columns supporting the upper balcony.
- (4) During construction of the pool the owners held discussions with both the pool installation contractor and ABCC regarding the barrier separating the lower level of the dwelling from the pool area.
- (5) The owner considered that a barrier in this location would be unsightly and would inhibit the external use of the pool area.
- (6) The owner considered that as only the pool area was located at the lower level of the overall development and this area had only one internal stair access to the dwelling above, it would be possible to provide a complying barrier with the installation of a self closing gate at the foot of the internal stair.
- (7) No written approval was given by ABCC for the modified barrier proposal.
- (8) The lower level included an enclosed habitable area housing rumpus room, laundry and change room /toilet.
- (9) The applicant believed the lower level had been designed totally as pool area and should not be considered as part of the dwelling. The enclosed area even included floor wastes to drain water dripping from people coming directly from the pool and using the rumpus area.
- (10) The pool-fencing barrier was completed with the installation of the self-closing gate at the foot of the internal access stair.
- (11) At the final inspection of the dwelling, the inspecting officer was not prepared to give approval for the pool fencing enclosure.
- (12) On the 17 October 2002 the owner applied to the Brisbane City Council (BCC) for an exemption of the pool fencing on the basis that the enclosure complied with the intent of the legislation. The application contained no details as to what exemption was requested.
- (13) On the 4 November 2002 the BCC refused to grant the exemption.

Material Considered

In coming to a decision, consideration was given to the following material:-

- (1) Pool approval dated 20 September 2001.
- (2) Application for exemption of pool fencing dated 17 October 2002.
- (3) Written decision from Brisbane City Council dated 4 November 2002 not to grant an exemption.

- (4) Appeal lodged with Department of Local Government and Planning dated 12 November 2002.
- (5) Verbal submissions from the owner, owner's advisers and Council representative.
- (6) The Building Act 1975;
- (7) The Standard Building Regulation 1993;
- (8) The Integrated Planning Act 1997;
- (9) Australian Standard AS 1926 – 1993 Parts 1 and 2
- (10) Department of Local Government and Planning, Building Codes Queensland, News Flash Issue 46 – dated 21 February 2000.

Findings of Fact

Section 14.(2) of the Building Act 1975 requires that before a pool is intentionally filled to a depth of 300mm or more with water it must first be fenced in accordance with the standard prescribed by regulation. The prescribed standard is set out in Part 5 of the Standard Building Regulation 1993.

Part 5 of the Standard Building Regulation 1993 came into force on 30 April 1998. It requires pools on residential land to be fenced in accordance with AS 1926 .1 - 1993, except for clause 2.14 of the Standard (child resistant door-sets).

It is noted Clause 2.14 of the Standard allows door-sets that satisfy specific conditions. Although Part 2 of the standard under 1.4.4 option C also states that access via child resistant door-sets also comprises safety and recommends door-sets only be used when physical circumstances preclude any other acceptable solution.

Queensland legislation, unlike some other States does not allow direct access from a dwelling to the pool enclosure. However, exemption powers are granted to the local government under clause 63.(1) of the Standard Building Regulation 1993, for special cases where it is not physically practical to build fencing. The local government can nominate specific conditions as part of the exemption

Reasons for the Decision

Two issues need to be considered:-

- (1) Is it physically impractical to construct a barrier between the pool and the dwelling?

No, in my opinion, it is **not** physically impractical to construct a barrier between the pool and the lower level of the dwelling irrespective of whether the lower level is or is not considered part of the dwelling.

- (2) Is the lower level part of the dwelling?

It is also my opinion that the lower level is part of the dwelling as it contains a rumpus room, laundry and toilet/change room in an enclosed habitable area. This area has direct access to the pool area via:-

- (a) the laundry and rumpus room through the external clothes drying area, and
- (b) the rumpus room through the sets of French doors.

It would be possible to make access (a) comply with the pool fencing legislation with the provision of a complying barrier between the dwelling and the perimeter fence at the end of the dwelling i.e. a barrier approximately 1800 mm long.

This leaves access (b) - the sets of French doors from the rumpus room to the pool.

In response to the applicant's suggestion that an alternative solution for access (b) would be to separate the laundry from the pool area with

- the addition of a new wall separating the access to the laundry from the pool area (i.e. clearly making the laundry part of the dwelling) and
- a new door between the internal self closing gate and the foot of the stairs.

I believe this proposal would be compliant provided all the sets of French doors are totally removed.

I am of this view for the following reasons:-

- the new door at the foot of the stairs would become the rear external door to the dwelling,
- the self closing gate would be the complying barrier between the rear external door and the pool area,
- the laundry would not be part of the pool area and would have internal access from within the dwelling.
- It is permissible to have a toilet/change room included in the pool area.

However, I am also of the view this proposal is impractical as it would render the remaining covered pool area, (rumpus room) being unenclosed and open to the weather, unsuitable for its intended use especially in winter and inclement days.

Hence the question arises, if the proposal is compliant with all the French doors removed, why is it not compliant with the French doors installed and held open when the pool area is in use?

I believe with the doors installed:-

- the French doors become the external doors to the dwelling;
- the new door at the foot of the stairs becomes an internal door;
- the rumpus room becomes part of the dwelling and not part of the pool area.

It is the intent of the pool fencing legislation to provide an effective barrier, which will restrict the access of young children (i.e. children under the age of 5 years) to private swimming pools.

With the French doors in place, whether they be open or closed, a false sense of security could be assumed by guests with young children and have them believe their young children are in a safe internal area.

A group of people (with young children) in a happy atmosphere enjoying themselves in an area which to most people would appear to be an internal rumpus room, can become complacent, doors can inadvertently be left open – a tragedy can easily occur.

It was noted the pool might not be clearly visible to persons entering the rumpus room via the internal stair especially at night.

The greater the safety features that are in place the more effective the barrier. Most people with young children now believe swimming pools are provided with an effective external barrier and do not expect to find an entirely enclosed habitable space connected directly to an external pool area with no self closing barrier.

Hence I believe it is for this reason the legislation does not allow direct access from the dwelling to the pool area, unless it is physically impractical to install a complying barrier.

In my opinion, if the French doors are to remain it is physically practical to install an effective complying barrier between the French doors and the pool.

It is pointed out that the owner has numerous choices of design and materials, including glass, which in my opinion would provide an aesthetically acceptable and effective barrier to young children.

In my opinion the BCC are correct in **not** granting an exemption of the pool fencing.

The current barrier does not satisfy the pool fencing legislation, it is a danger to young children visiting the premises and until the barrier is modified to comply, the owner should ensure that all doors and windows providing access to the pool area are locked and the key is located in a safe place out of the reach of young children.

The pool-fencing barrier should be made compliant within 20 business days of the date the owner receives this decision or the pool is to be emptied so as not to hold a depth of water greater than 300 mm.

Leo F Blumkie
Building and Development
Tribunal Referee
Date: 3 December 2002

Appeal Rights

Section 4.1.37. of the Integrated Planning Act 1997 provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Tribunal or
- (b) that the Tribunal 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 Tribunal's decision is given to the party.

Enquiries

All correspondence should be addressed to:

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