



**APPEAL**  
*Integrated Planning Act 1997*

**File No. 3/03/032**

## **BUILDING AND DEVELOPMENT TRIBUNAL - DECISION**

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**Assessment Manager:** Caboolture Shire Council  
**Site Address:** 1 Bellthorpe West Road, Bellthorpe.

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### **Nature of Appeal**

The appeal is against the decision of the Caboolture Shire Council not to grant an exemption to the swimming pool fencing requirements under Section 15(1) of the Building Act 1975 for a pool located on land described as Lot 2 on RP 896080 and situated at 1-9 Bellthorpe West Road, Bellthorpe.

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**Date and Place of Hearing:** 9.00 am Wednesday 4 June 2003  
1 Bellthorpe West Road Bellthorpe.

**Tribunal:** L F Blumkie

**Present:** Applicant / Owner  
Mr C Harris - Caboolture Shire Council representative  
Mr L Blumkie - Tribunal Referee

### **Decision**

In accordance with section 4.2.34.(2) of the Integrated Planning Act 1997 I **change** the decision made by the Caboolture Shire Council and grant an exemption under section 15 of the Building Act 1975 not to require fencing of the pool on the southern side (side facing the natural slope and bush) subject to the pool being fenced on the remaining sides as follows:-

- Northern side – A new complying fence being constructed from the north east corner of the house to the front boundary fence or to the existing east boundary fence.

- Eastern side – The existing boundary fence being clad with palings from the front fence (or to the point where the new northern fence meets the existing eastern fence) to a point down the slope where the fence will meet the natural bush.
- Western side – The existing eastern veranda of the house is to be enclosed with a complying barrier (eg glass) from the store room on the north east corner to the south east corner of the veranda and a complying fence is to be constructed from the south east corner of the veranda to a point down the slope where the fence will meet the natural bush.

I also grant an exemption under section 64 of the Standard Building Regulation 1993 to allow a gate in both the western and northern fence subject to the gates complying with section 64.(3) (a), (b), and (c) of the Standard Building Regulation 1993.

All to be completed within 60 days of receipt of this decision unless otherwise extended by the local government.

### **Background**

The property is a rural property some 5.624 ha in area (approximately square in shape) located on the edge of a steep slope and adjacent to natural dense bush.

The owner sought advice on the construction of a new pool from a pool company. The pool company obtained building approval for a new pool from Coastline Building Approvals on 28 November 2001.

The approved site plan indicated a pool fence surrounding the pool and included the words “new pool fence and safety gate”. The approval included details of a fence and gate.

The pool was constructed, however it was not filled with water until October 2002 due to the unavailability of water as a consequence of the drought in the area.

The property has 2 dams one of which is within 2m of the western side of the house. This dam is approximately 2m deep and is primarily used to store water for watering of the landscaping. It is readily accessible from the house and clearly visible from the road.

The property is fenced on three sides and has natural bush and a steep slope on the fourth side. The only access from the road is via an electric gate which is kept closed at all times and is controlled by an intercom system. A personal access gate is locked and is only opened on rare occasions.

The unfenced pool was brought to the attention of the Council by an officer carrying out the yearly inspection to test the quality of the environmental septic tank.

Council notified the Private Certifier, who inspected the property on the 2 April 2003. The Certifier issued an enforcement notice on the 7 April 2003. (This notice is the subject of a separate appeal No 3/03/027).

On the 24 April 2003 the owner made application to the Caboolture Shire Council for an exemption of the pool fencing.

Caboolture Shire Council refused to grant the exemption on the 7 May 2003.

The owner submits that to fence the pool in accordance with the approval would remove the aesthetic effect of the pool currently achieved when viewed from the house to the natural valley below.

The owner also submits that

*“it would be unlikely a young child will be able to gain access to the pool because:-*

- *We do not have any children under the age of five and both our children can swim;*
- *Children under the age of five rarely visit the property and if they do the visitors are made aware the pool is not fenced and can ensure their children are supervised. In addition, the doors of the house can be bolted and deadlocked and the gates on the veranda locked and the pool is in view of the house.*
- *It is extremely unlikely children under the age of five will be able to access the pool without our knowledge as:-*
  - (a) *the property is in a rural area and has an area of 15 acres. Surrounding properties are generally larger than 40 acres;*
  - (b) *the property is securely fenced on three sides (with either five to six foot high steel fences or timber rails fences with electric gates (operated in conjunction with an intercom system) which are always closed when not in use and when in use access must be made over a grid. The remaining side is so steep and hostile we do not believe neither a child nor an adult would be able to access our property;*
  - (c) *the pool blended into the landscape and (unlike the dams) is not visible from the outside the property which means there is no incentive for a child to try and gain access to the pool;*
  - (d) *there are no children under the age of eight residing within a two kilometre radius of the property.*
  - (e) *There are two dams (used for irrigation) on the property and a number of unfenced dams on the surrounding properties.”*

### **Material Considered**

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

- (1) Pool Approval dated 28 November 2001 decision notice BP-1222;
- (2) Site Plan of property numbered 896080;
- (3) Bulletin No 75 November 2002 Queensland Injury Surveillance Unit;
- (4) Application for exemption of pool fencing dated 24 April 2003;
- (5) Decision notice from Caboolture Shire Council dated 7 May 2003 refusing to grant the exemption.
- (6) Appeal lodged with the Department of Local Government and Planning dated 28 May 2003;
- (7) Verbal submissions from owners and Council representative.
- (8) The Building Act 1975;
- (9) The Standard Building Regulation 1993;
- (10) The Integrated Planning Act 1997;
- (11) Australian Standard AS 1926 – 1993 Parts 1 and 2;
- (12) Department of Local Government and Planning, Building Codes Queensland News Flash Issue 46 – dated 21 February 2000.
- (13) Building Code of Australia (BCA).

## Findings of Fact

Section 14 of the Building Act 1975 requires outdoor swimming pools on residential land to be fenced.

Swimming pool is defined in the Building Act 1975 as an excavation or structure capable of being filled with water to a depth of 300mm or more and capable of being used for swimming, bathing, etc.

It clearly excludes a dam or tank solely or principally used, or designed for storage of water.

Residential land is defined in the Building Act as land on which a class 1 or 2 building is constructed etc.

Building legislation includes the power for a local government to grant exemptions for pool fencing under two sections namely:-

- The Building Act 1975 - Section 15 and
- The Standard Building Regulation 1993 - Sections 64, 65 and 66.

### 1 The Building Act 1975.

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.

Section 15 of the Building Act provides power to local government to grant exemptions under certain conditions namely:-

*“The Local government may grant the exemption only if it is satisfied it is unlikely a young child would gain access to the pool because of-*

- (a) the physical nature or location of the land concerned; or*
- (b) the design or construction of the pool concerned; or*
- (c) the location of the pool or fencing.”*

### 2 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).

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 compromises safety and recommends door-sets only be used when physical circumstances preclude any other acceptable solution.

Queensland legislation does not allow door-sets but amongst other things does grant exemption powers under clauses 64.(1) of the Standard Building Regulation 1993 to allow a local government to consider an exemption for a non-complying door or gate where it is not physically practical to construct fencing between the pool and a class 1 building.

Also, prior to the changes made to the legislation on 30 April 1998 it was possible for a local government to consider for allotments over 4000 square metres whether children resided on or regularly visited the property. This criteria was withdrawn as part of the changes introduced in April 1998 and a news flash, Issue 46 – dated 21 February 2000 clearly states, “ *the Council is no longer able to consider whether young children live on, or are likely to visit the premises*”.

### **Reasons for the Decision**

The new pool satisfies the definition of swimming pool as contained in the Building Act 1975.

The dam adjacent to the house is not included in the definition and therefore under the current legislation is not required to be fenced.

I agree with the owner this dam may be a greater danger to young children than the unfenced pool for the following reasons:-

- It is clearly visible from the road
- It is not properly fenced from the road
- It has direct access from the house
- It is greater than 300mm in depth
- It is not visible from the main living area of the house.

However, dams are not required to be fenced under the current legislation and I believe it is left up to the owner to decide whether to fence them or not.

After considering the exemption powers available, I believe the local government should have granted an exemption not to fence the pool on the southern side under Section 15.(2)(a) namely

*“the physical nature or location of the land concerned;”*

The land is located adjacent to a steep slope and natural bush, which in my opinion makes this side of the pool not accessible to young children.

As it is no longer possible to consider the size of the property and whether children under five live on the property, then the remaining sides need to be protected.

This is achieved by:-

- The front boundary fence. This fence does not strictly comply because of the gap of 120mm between the vertical bars, however in my opinion because the pool is some 90m from this front boundary fence and is not visible to a young child, I believe it is adequate protection.

I have formed this opinion for the following reasons:-

1. Clause D2.16 of the BCA permits railings with openings up to 125mm.
  2. A toddler capable of travelling 90 metres is likely to be at least two years of age and therefore unlikely to be able to pass through an opening of 120mm.
- Making the fence on the eastern boundary comply ie with the addition of palings.
  - Providing protection from the house at the veranda railing line and a new fence between the house and the natural bush on the western side.
  - Providing protection from the corner of the house and the eastern boundary fence on the northern side. This can be achieved by utilising part of the existing front fence.

This in my opinion will provide an effective barrier to young children under the age of five living on or visiting the property and satisfies the intent of the legislation.

It takes into account access from within and outside the property. It provides in my opinion far greater protection than that required for the existing dam adjacent to the house.

Activities likely to be carried out within the enclosure are associated with the use of the pool. BBQ's, clothes drying etc are all undertaken outside the enclosure.

However it will be necessary on a regular basis to bring mowing equipment etc into the enclosure. Hence I believe an exemption should be granted under Section 64.(1) of the Standard Building regulation 1993 namely:-

*“Exemption for a non-complying door or gate.”*

This exemption will need to satisfy the conditions stipulated under Section 64(3) (a), (b) and (c).

I have sympathy for the owners as in their particular situation they have adopted a sensible approach, however properties can change ownership and situations can change.

The fact that the dam is a greater danger to young children is not a reason not to fence the new pool.

The current legislation does not permit the local government or Tribunals to consider whether young children reside on or visit the premises.

The law requires the owner to fence the pool before it is filled to a depth greater than 300mm. If the owner intended not to fence the pool they should have applied for an exemption before the pool was filled. They are currently breaking the requirements of the Building Act and should install temporary fencing or equivalent protection until the pool is properly fenced.

I appreciate it will take time to obtain quotes and decide the type of fencing, hence I hereby require the permanent fencing to be in place within 60 days of receipt of this decision. The local government may extend this date provided a request is made in writing before the expiry date and adequate reasons are provided.

This decision should be read in conjunction with the decision on appeal No 3/03/027.

In accordance with section 4.2.34.(2) of the Integrated Planning Act 1997 I change the decision made by the Caboolture Shire Council and grant an exemption under section 15 of the Building Act 1975 not to require fencing of the pool on the southern side (side facing the natural slope and bush) subject to the pool being fenced on the remaining sides as follows:-

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I also grant an exemption under section 64 of the Standard Building Regulation 1993 to allow a gate in both the western and northern fence subject to the gates complying with section 64.(3) (a), (b), and (c) of the Standard Building Regulation 1993.

All to be completed within 60 days of receipt of this decision unless otherwise extended by the local government.

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**Leo F Blumkie**  
**Building and Development**  
**Tribunal Referee**  
**Date: 12 June 2003**

## **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:

The Registrar of Building and Development Tribunals  
Building Codes Queensland  
Department of Local Government and Planning  
PO Box 31  
BRISBANE ALBERT STREET QLD 4002  
**Telephone (07) 3237 0403: Facsimile (07) 32371248**