



Building and Development Tribunals
Queensland Government

Department of Local Government, Planning,
Sport and Recreation

APPEAL

Integrated Planning Act 1997

File No. 3-06-104

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Redland Shire Council

Site Address: *Withheld* – “the subject site”

Applicant: *Withheld*

Nature of Appeal

Appeal under Chapter 9 Section 250 of the *Building Act 1975* against the Redland Shire Council’s decision to issue an Enforcement Notice (No. ENF005846 dated 16 November 2006) requiring a swimming pool to be fenced to current standards, on land described as Lot “*withheld*” and situated at “the subject site”.

Date and Place of Hearing: 10.00am, Tuesday 19 December 2006
at “the subject site”.

Tribunal: Raymond W Rooney

Present: Representative for applicant
G. Simpson – Redland Shire Council Representative
A. Mathieson – Redland Shire Council Representative
C. Diggles – Redland Shire Council Representative
G. Kirby – Redland Shire Council Representative
L. King – Hemming and Hart Lawyers (observer)

Decision

Taking into consideration the relevant facts and circumstances, the Tribunal **sets aside** the Redland Shire Council’s decision contained in its Enforcement Notice ENF005846 dated 16 November 2006 that the pool is dangerous requiring immediate compliance with the current *Building Act 1975* - Chapter 8 and *Building Regulation 2006* - Part 4 and Building Development Approval No. SP1758, requiring particular items of non-compliance to be rectified, viz –

- (a) Climbable objects are within 300mm of the inside of the pool fence in sections where vertical paling/bar spaces are greater than 10mm; and
- (b) There is direct access from the dwelling to the swimming pool; and
- (c) The security door which forms part of the swimming pool gate is not self closing and/or self latching; and
- (d) There is no non-return valve fitted to the outdoor tap which is used to fill the pool; and
- (e) There is no resuscitation sign visible in the pool area.

and decides that:

- (a) On inspection there are no climbable objects referred to in (a);
- (b) The direct access from the dwelling to the swimming pool is “protected”, satisfying the requirement for an “existing building” under the State legislation introduced in 1991;
- (c) The existing pool fencing satisfies the standards prescribed under the *Building Act 1975*.

Background

- The pool and fencing was approved in approximately August 1986 meeting the requirements of Chapter 42 of Councils local laws for pool fencing. This was confirmed by a final inspection carried out in approximately August 1986.
- State legislation introduced in the *Local Government Act 1936* in 1991 required owners for existing pools to meet minimum standards of fencing. Where a local law was of a less standard the State Legislation applied. As Redland Shire Councils laws were less stringent, the State Legislation was applicable.
- On complaint, Council carried out an inspection on 14 October 2004 and issued an Enforcement Notice on 15 October 2004 for a dangerous pool fence.
- Council undertook a further inspection on 1 November 2006 and determined that there were still some issues outstanding to meet the 1991 fencing standards. The inspection report stated –
 1. Pool fencing was non compliant with current standards.
 2. Advice was given in 2002 to bring fence up to current standard as no fencing existed.
 3. Owner only tried to upgrade to 1991 standard, which was not acceptable and also did not comply with 1991 standards.
- Accompanying notes taken relating to the 1 November 2006 inspection include –
 4. Self closing doors – not self closing and open into pool enclosure.
 5. Canal sides of pool had a retaining wall with steps allowing easy access to pool.
 6. Canal sides not fenced.
 7. Advice given on how to upgrade fencing to current standards. The owner’s agent undertook to advise owner.
 8. Unable to gain access to wooden gate at side so couldn’t test for compliance.
 9. Existing spa had been relocated onsite without approval.

- Accordingly, Council issued a new Enforcement Notice dated 16 November 2006.

Material Considered

1. Form 10 – Building and Development Tribunal, Appeal Notice dated 23 November 2006 setting out grounds of appeal;
2. Council's letter dated 15 November 2006 to the owner's agent advising it considered the pool dangerous and that an Enforcement Notice has been issued to the owner to bring the fencing into compliance immediately. The Notice also advised a development application is required for the fencing and for the unapproved spa;
3. Enforcement Notice ENF0005846 dated 16 November 2006 referred to in 2;
4. Site Plan of pool as approved (permit no. 1758) – date unclear;
5. Site Plan of pool as approved (permit no. 29250) September 1985;
6. Written submission by Council with accompanying photos;
7. Written submission by the owner with accompanying photos;
8. Subsequent to the hearing, additional information including copies of approved plans and relevant photographs submitted by both parties;
9. Verbal submission from applicant explaining reasons for appeal;
10. Verbal submission from G. Simpson explaining the reasons Council issued an Enforcement Notice;
11. *The Building Act 1975*;
12. *The Local Government Act 1936 – Section 49H* – Control and regulation of swimming pool fencing; and
13. *Local Government Act (Swimming Pool Fencing) Amendment Act 1991* – Act No. 49 of 1991, an act to amend the *Local Government Act 1936*.

Findings of Fact

1. The swimming pool and fencing was approved for construction (permit no. 1758) in 1985 under chapter 42 of Council's pool fencing by-law.
2. Council carried out a final inspection of the completed pool and fencing and gave final approval in approximately 1986.
3. The present owner purchased the property in or about 1993.
4. On complaint, Council inspected the pool and fencing in 2004 to determine compliance.
5. Council issued an Enforcement Notice for a dangerous pool on 15 October 2004.
6. Council reinspected the pool and fencing on 1 November 2006.
7. Council issued an Enforcement Notice dated 16 November 2006.

Reasons for the Decision

1. The *Local Government Act 1936-1984* – Section 49H, which commenced 1 February 1991, required owners of “existing pools” to satisfy minimum fencing standards. Where a local law was less effective than the State legislation, then the State legislation was applicable. Consequently, Redland Shire Council’s local laws in respect to outdoor pools on residential land became inoperative and owners were required to comply with the new fencing standards.
2. For a pool constructed before 1 February 1991 the new State standards for a compliant pool fence took into account some local laws allowing pool fencing 900mm high provided it inhibited access by young children and allowed other concessions to the adopted Australian Standard AS 1926-1986. However, it required all openings from a building giving access to the pool to be “protected” to inhibit access to the pool by young children in the building.
3. (a) *The Local Government (Swimming Pool Fencing) Amendment Act 1991* – Act No. 49 of 1991 was an Act to amend the *Local Government Act 1936*. It became effective on 14 September 1991. It made amendments to clarify the intent and facilitate the administration of the Act and introduce some further provisions.
 - (b) Included in the amendments were provisions that allowed Local Authorities to permit protected access doors in existing situations to open towards the swimming pool. It also allowed window sills in existing buildings to be 900mm high with securely fixed fly screens, in lieu of 1200mm previously required. Openings that were lawfully constructed under a local by-law existing before 1 February 1991 do not have to comply with AS 1926 – 1986.
 - (c) Further, by-law 11.5 sub clause (3) allows a Local Authority to give more than 1 approval in respect to any one opening – ie there may be two approvals for 1 door, one covering the location of its latching mechanism, the other the direction of swing.
4. (a) In this instance, the existing pool fencing is a minimum 1200mm high with an “effective height” of 900mm, has self closing self latching doors opening out from the pool. The owner claims, and it appears so, that the timber constructed fencing from the house to the adjoining boundaries to the east and south as indicated on the approved plan, remain in place. One pair of gates (not adding protection to the pool) have been removed and an electronically operated front gate installed.
 - (b) Perimeter fencing to adjoining properties exceeds 1200mm in height. Fencing on the eastern boundary terminates above the revetment wall and was required to project 900mm beyond the wall to maintain the “effective height”. The new fence described in 5. (b) inhibits access from this direction.
5. (a) Fencing in addition to that indicated on the approved plans runs at right angles from the west side of the house to the canal. This wall prevents direct access to the pool from any “unprotected” openings south of this wall. Council photographs 2004 indicate no fence at that time. The owner asserts this wall was in place when he bought the property in 1993 and that it was temporarily removed to allow new paving to be laid, then reinstated.

- (b) Another new fence separating the pontoon in the Canal from the pool is now in place. It projects approximately 900mm beyond the revetment wall and provides an additional barrier to inhibit young children from the neighbouring property to the east. This is not a required fence under the Act.
- (c) There is a complying fence from the north east corner of the house to the eastern boundary fence. This is additional to the fence in place as shown on the approved plan.
6. (a) Regarding the canal frontages, the *Local Government Act 1936* – Section 49H Subsection (9A) specifically provides that the owner of land that adjoins a water course (which includes a canal) will not be required to erect complying fencing between the pool and the water course unless the Local Authority determines that fencing is necessary to inhibit access by young children to the pool. In this case, Council did not inform the owner Council determined it necessary to fence.
- (b) In any case, I am of the view that the “fence” (which the Australian Standard defines as the assembly of components “natural or otherwise” which forms the intended barrier, exclusive of gates or doorsets) provided by the rocky embankment and concrete revetment wall at least 900mm high, would inhibit access by a young child as it is not accessible from the canal side.
7. (a) Regarding protection of openings; I consider that the openings giving access from the building to the pool are protected in accordance with the requirements of the *Local Government Act 1936* as amended and as described in paragraph 3.
- (b) The sliding doors have sliding self closing security screens with latches 1500mm above the floor.
- (c) The hung door from the kitchen opens into the house with a self closing security screen door opening into the pool area, with a latch 1500mm above the floor. As outlined in 3. (b), the Act allowed under By-law 11.5 subclause (6) Local Authorities to permit protected access doors in existing situations to open toward the pool if it is satisfied that it is impractical or inappropriate for the door to open inwards to the building. “Guidelines for the interpretation of Swimming Pool Fencing Requirements” (second edition) specifically considers this direction of swing and indicates a Local Authority may approve the door opening out if it is impractical to do otherwise. I am of the opinion that in this instance it would be impractical to open the door away from the pool.
- (d) All window openings opening to the pool are “protected”. Pools lawfully constructed before 1 February 1991 the Local Government could approve a sill height not less than 900mm with a security fixed fly screen.
8. Regarding the Enforcement Notice, I comment on the particular items referred to and as set out in the Decision under -
- (a) There are now no climbable objects inside the pool fence as described.
- (b) Direct access from the dwelling to the pool is via “protected” openings complying with the legislation applicable as described in paragraph 7.
- (c) The security door referred to is addressed in paragraph 7. (c).

- (d) The non-return valve has now been fitted.
- (e) The resuscitation sign has now been provided although this was not a requirement under the applicable Act.

9. The Enforcement Notice further gives notice that Section 237 of the *Building Act 1975* requires, where a pool fence is demolished, removed or is beyond repair, the owner to construct a new fence complying with the current fencing standards for a new pool.

I am of the opinion this provision is not applicable in this instance as, in essence the fence as approved remains in place and is in good repair.

10. Council further submits that Sections 237, 233 (2) and 235 of the current Building Act (amended September 2006) support their view that, as the pool fencing has never complied with the 1991 Pool Fencing Standards (49(H) *Local Government Act 1936*), then fencing complying with current standards is required.

Regarding Section 233 (2), I am of the opinion that the pool is fenced and complies substantially with the fencing standards introduced in February 1991 applicable at the time.

Regarding Section 235, I am of the opinion that the pool fencing complies with the Fencing Standards for the pool and is kept in good condition.

11. Council's letter dated 15 November 2006 attaching Enforcement Notice also under paragraph 3, 4 and 5 refers to a spa, and requests an application for its relocation and fencing. This is outside the scope of this appeal.

12. In summary, it is my opinion that the pool fencing satisfies the relevant legislation and is not dangerous. The fencing is substantially that approved and took into consideration the requirements of the *Local Government Act 1936* introduced in February 1991. One exception was the maintaining of the "effective height" of the eastern boundary fence at the Canal revetment wall. This in itself is not sufficient to warrant upgrading to current standards. As noted in 5. (b) protection is now provided.

Regarding the fencing referred to in 5. (a), I am of the opinion that, despite the issue of whether it was in place to comply with the legislative requirement of 1991, this portion of fencing in itself does not trigger the application of Section 16 "replacement fencing" in the Act at the time of inspection in 2004 (now Section 237 of the current *Building Act 1975*), as the fencing essentially complied with the standards introduced in February 1991. Further, the fencing complies substantially with the Fencing Standards under section 1. (a) of Section 233 of the current Act.

Mr Ray Rooney
Building and Development Tribunal
General Referee
Date: 12 January 2006

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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