



Building and Development Tribunals

Queensland Government

Department of **Local Government and Planning**

APPEAL

Integrated Planning Act 1997

File No. 03/07/039

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Redland Shire Council

Site Address: *withheld*-“the subject site”

Applicant: *withheld*

Nature of Appeal

The appeal is against the decision of the Redland Shire Council to issue an Enforcement Notice dated 4 July 2007 in relation to an existing pool. The reasons for the Enforcement Notice are :-

- Council reasonably believes that the building work (the unprotected swimming pool) is dangerous, namely an unfenced pool which is filled with water to a depth that exceeds 300mm; and
- Council is of the opinion that the swimming pool is not in accordance with legislative requirements.

The pool is on land described as *withheld*.

Date and Place of Hearing: 10.00 am Tuesday 18 September 2007
with an inspection of “the subject site”

Tribunal: Mr L F Blumkie Tribunal

Present: Applicant/Owner
Owner’s husband
Mr Larry Kumskov Town Planner advisor to Applicant
Mr Vadim Ribinsky Redland Shire Council Representative
Mr Mike Ryan Redland Shire Council Representative
Mr Leo Blumkie Chairperson Tribunal

Decision

The Tribunal, in accordance with Section 4.2.34 of the *Integrated Planning Act 1997* changes the conditions of the Redland Shire Council Enforcement Notice dated 4 July 2007 by:-

- deleting the first paragraph on page two of the notice namely:-

"AND TAKE FURTHER NOTICE that you are required to make the swimming pool safe by immediately bringing the fencing at the Premises into compliance with:-" and

- replacing it with the following paragraph:-

"AND TAKE FURTHER NOTICE that you are required to make the swimming pool safe within twelve (12) weeks of the date of this determination (unless otherwise extended by the Redland Shire Council before the expiry date. A request for extension must be in writing to the Redland Shire Council) by bringing the fencing at the Premises into compliance with:-"

Background

The property backs onto a permanent watercourse namely a canal forming part of the Cleveland Raby Bay development.

On the 10 April 1997, Redland Shire Council gave approval to the then owners for an in-ground swimming pool on the property.

The approved documents included a site plan showing the pool to the rear of the property approximately 2 metres from the canal boundary alignment.

The plan also indicated perimeter isolation fencing to the pool, which included a fence on the canal side of the pool, located approximately 1 metre from the canal boundary alignment.

The approval was subject to conditions 1 to 13.

Condition 1 required construction to be commenced within twelve (12) months and completion within eighteen (18) months - *Standard Building Law 3.1 & 3.2 (c) (i)*.

Condition 13 required inspections to be carried out by Council or a Certifier for both placement of "steel" and on "completion".

An engineer's certificate, dated 17 April 1997, was provided for the "reinforcement and soil conditions".

It would appear that no completion inspection was carried out, as neither the applicant nor Council was able to produce an inspection certificate for completion of the work.

The current owner, *withheld*, purchased the property around September 2005. Council advice to the purchaser's solicitor, dated 20 September 2005, stated that the required final inspection for the pool has neither been called for nor carried out by council officers.

Hence, some time between the approval given and completion of the pool by the original owner, the following changes were apparently made to the fencing of the pool:-

- fencing to the canal side of the pool was deleted; and
- the central self closing gate was repositioned to the left side and an additional gate was included on the right side; and
- the separate fence on the left side was deleted and the boundary fence became the pool fence. Both boundary fences were extended 900 mm over the canal revetment wall.

Council has no record of an amended application being made for the changes to the original approval. Such changes, under the legislation at the time, would have required an amended application.

The *Building Act 1975*, current at the time of approval, 10 April 1997, contained an exemption clause for waterfront land namely:-

Exemptions - waterfront land

300.(1) The owner of land_

- (a) *adjoining a watercourse; and*
- (b) *where there is an existing swimming pool or a new swimming pool is constructed or installed;*

is required to construct fencing to isolate the swimming pool from the water course only if the local government decides the fencing is necessary to inhibit access by young children to the swimming pool.

The original owner apparently chose not to take advantage of this clause and documented the pool application to include isolation fencing to the pool. (i.e. complying fence between the pool and canal)

As mentioned above, council approved the application with total isolation fencing.

Both adjoining properties have in-ground swimming pools at the rear of the property facing the canal and both appear to have complying pool fencing between the pool and the canal boundary.

The revetment wall to the canal is approximately 600mm above the rocks, which are exposed at low tide and are possibly covered at high tide. The canal boundary wall at 600mm high would not comply as a pool fence.

A survey undertaken by the owner in August 2007 indicated some 35 homes with canal frontage in the Raby Bay development, which appear to have swimming pools facing the canal, without complying fencing on the canal side.

Council officers advised after the hearing (at Council Chambers) that Council currently has a pool inspection program for the whole of the Shire in progress. In the Raby Bay area, sites identified with pools should be receiving an initial letter in coming weeks and the proposed time frame would have sites not complying and dangerous, being issued with an enforcement notice in approximately the next eight weeks. However, after allowing for the possible appeal process/having the work carried out, it could be up to 16 weeks before such pools have complying fencing.

Many public spaces were identified fronting the canals, which have no fencing. Also Council has constructed numerous decks and landings in parkland on the canals, which have no complying child safety fencing on the sides facing and some even over the water.

An appeal was lodged with the Registrar of Building and Development Tribunals on the 7 July 2007.

Material Considered

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

- 1 Pool approval No 97 - 1364 dated 10 April 1997;
- 2 "Form 10 – Notice of Appeal" dated 12 July 2007 including grounds for appeal and correspondence accompanying the appeal;
- 3 Enforcement Notice dated 4 July 2007;
- 4 Redland Shire Council building search prepared for the owners purchase of the property;
- 5 Redland Shire Council correspondence to the owner, dated 16 January 2006;
- 6 Verbal submissions from the applicant, the applicant's husband and Mr Larry Kumskov;
- 7 Written submission from applicant;
- 8 Verbal submissions from Mr Mike Ryan and Mr Vadim Ribinsky;
- 9 Written submission from Redland Shire Council, No: 3-07-039;
- 10 Summary prepared by the applicants Solicitor and tabled at the hearing;
- 11 Redland Shire Council file records Appendix 9 request No 429899.
- 12 Inspection of "the subject site";
- 13 The *Integrated Planning Act 1997*;
- 14 The *Building Act 1975*
- 15 The *Building Regulation 2006*; and
- 16 Australian Standard AS 1926.1 – 1993.

Findings of Fact

The subject property backs onto a permanent watercourse (canal), which is generally greater than 300mm deep (observed on site).

The swimming pool approval, dated 10 April 1997, included a complying fence between the pool and the watercourse (canal).

The approval conditions called for, amongst other things, a final inspection. No final inspection was called for nor carried out.

A search, at the time of purchase of the property by the owner, identified that no final inspection had been carried out on the pool.

As a result of the search Council followed up on the final inspection and forwarded a letter to the owner on the 16 January 2006

The pool fencing legislation applicable at the time of approval included power to grant exemptions for pools fronting canals, watercourses etc, not to fence the canal, watercourse boundary.

This exemption power was subsequently removed from the Legislation in late 2003.

It is noted that the correspondence, enforcement notice from Council and also verbal discussions between the owner and council leading up to the hearing date, have not identified the specific area of non compliance.

Even the inspection certificate issued by Redland Shire Council, dated 1 March 2006, does not identify the specific area of non-compliance, namely: no fence between the pool and the canal.

Reasons for the Decision

Two matters need consideration namely:-

A Fencing the canal side of the pool

- 1 The *Building Act 1975* requires fencing to all outdoor swimming pools constructed on residential land.
- 2 The fencing must comply with the standard prescribed under the *Building Regulation 2006*.
- 3 The owner of the property at the time of documentation for the pool included isolation fencing to the pool. Council considered the application and because fencing was included on the canal side of the pool, Council did **not** need to consider their power of exemption to water front land.
- 4 Had the application not included isolation fencing to the canal, then Council would have had to consider if fencing the canal side of the pool was necessary, and if so, condition such fencing in writing as required by clause 30O.(1) of the *Building Act 1975*.
- 5 Had the previous owners made an amended application to Council at the time of changing the fencing to the pool (required by law), the matter of fencing the canal side of the pool would also have been considered by Council and if fencing was necessary, condition such fencing in writing as mentioned above.
- 6 In the Tribunals opinion, had council considered this matter by either of the above possibilities an exemption not to fence the canal side of the pool would have been granted.
- 7 Because the legislation has changed it is now not possible to grant an exemption not to fence the canal side of the pool.

B Is the pool dangerous

- 1 With the current pool fencing legislation it is not possible to conclude that an unfenced swimming pool (even if partly unfenced) on residential land is not dangerous.
- 2 Therefore the Council, in my opinion, is correct in skipping the "Show Cause" process and going straight to the "Enforcement Notice".
- 3 However, the degree of danger needs to be considered. In the Tribunals opinion, it is a very low danger that a young child could gain access to the pool for the following reasons:-

(i) To gain access to the pool-

- a young child would need be on the vacant block (2 along from the subject property and the closest point to access the pool),
- climb down the existing revetment wall (600mm high minimum),
- travel along the uneven rocks for at least 22 metres to the subject property, without falling into the water of the canal (more than 300mm deep),
- climb up the revetment wall (minimum 600mm high), and
- climb the coping to the pool (varies in height).

- (ii) The subject pool is not visible from the closest possible access (the vacant block)
- (iii) The subject pool, with its current pool fencing and location, in my opinion, is not as dangerous as the access from the unfenced public parks and non-complying public decks fronting the canals. It is acknowledged that such bodies of water are not required to be fenced.

In the Tribunals opinion, it is unreasonable for the Council to require the pool to be fenced on the canal side **immediately** for the following reasons:-

- The degree of danger for a young child is very low.
- The pool has been in its current state since 1997 without a problem.
- There are possibly some 35 other properties with pools in the immediate canal area in a similar situation that are unlikely to receive an enforcement notice for at least 8 weeks and yet possess the same risk as the subject property.
- The risk to a young child in the public space fronting the canal is in my opinion a greater risk.
- Council identified the risk in March 2006 and it was not until July 2007 that they issued the enforcement notice. If it is that important to fence the subject pool **immediately** why did Council take some 16 months to issue the notice?

Allowing sufficient time for the owner to :-

- obtain accurate advice from a certifier,
- investigate the options, types, costs and location of fencing,
- document the proposal,
- obtain quotes and
- find a fencing contractor available to undertake the work,
- perform the work.

I believe it would be a fair and reasonable time frame to have the pool fenced on the canal side within **twelve (12) weeks**.

Should this time frame not be possible, for some legitimate reason, the Council should have the right to consider the reason and if acceptable extend the time frame. Any extension of the time frame requested by the owner should be in writing to the Council before the expiry date.

Leo F Blumkie
Building and Development Tribunal
Date: 21 September 2007

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, Planning, Sport and Recreation
PO Box 15031
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 32371248