



Development Tribunal – Decision Notice

Planning Act 2016, section 255

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| Appeal number: | 22-062 |
| Appellant: | Lucas Garden Pty Ltd ACN 629 427 505 as Trustee for the Lucas Garden Trust |
| Respondent | Scenic Rim Regional Council (Council) |
| Site address: | 351 Armstrong Road Biddaddaba Qld 4275 and described as Lot 2 on RP 850212 – 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 Scenic Rim Regional Council on 22 November 2022 alleging failure to comply with the pool safety standard pursuant to section 232 of the *Building Act 1975* (Building Act).

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| Date and time of hearing: | Monday, 30 January 2023 at 10:40 am |
| Place of hearing: | The subject site |
| Tribunal: | Don Grehan – Chair Sandra Tempest – Member |
| Present: | Feng Kou, Director/ Secretary Lucas Garden Pty Ltd – Appellant Jing Gao – Appellant’s interpreter Mark Lohmann – Council Representative Danila Smith – 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 22 November 2022 to a decision to issue a notice in the same form except that the requirements identified in the notice as Requirements 1, 2, 3 and 4 read instead as follows:

- Requirement 1:** The Appellant must immediately secure the swimming pool so as to restrict access to the structure by young children by installing either a temporary or permanent barrier complying with the pool safety standard inclusive of a complying gate and resuscitation signage; and
- Requirement 2:** The Appellant must immediately display a warning sign complying with section 14 of the *Building Regulation 2021* at the gate providing vehicular access to the property in order to warn members of the public in the vicinity of the land that work is being undertaken on the pool and that

there is a potential danger to young children accessing the land; and

Requirement 3: The Appellant must, with fourteen (14) days of the date of this decision, have the temporary or permanent barrier referenced in Requirement 1 and the signage referenced in Requirement 2 inspected by Council and, where directed, do all things necessary to satisfy Council as to the compliance of the barrier and signage with the pool safety standard and the *Building Regulation 2021*; and

Requirement 4: The Appellant must do all things necessary to (a) obtain a development permit for building work from either a private building certifier or Council in relation to the construction of new permanent swimming pool barrier and (b) obtain a Form 17 Final inspection certificate; by no later than 4pm Friday 30 December 2023.

Or

The Appellant must do all things necessary to (a) obtain a development permit for building work from either a private building certifier or Council to demolish/decommission the swimming pool and (b) obtain a Form 21 Final inspection certificate; by no later than 4pm Friday 30 December 2023.

Background

1. On 28 December 2016, a major fire event occurred in the dwelling on the subject site resulting in substantial damage to both the dwelling and the adjacent swimming pool enclosure noting that the perimeter of the dwelling formed a significant portion of the pool safety barrier.
2. The Appellant purchased the subject site in or about July 2020 and no pool safety certificate was in place at the time of the transfer of ownership.
3. In response to a complaint, Council conducted a compliance inspection of the swimming pool barrier in May/June 2021, which gave rise to a series of informal emails between Council and the Appellant.
4. Following an inspection of 24 June 2021, Council was satisfied that a complying temporary fence was in place and, while this was not formally recorded, were of the expectation that a development permit for building work to formalise a permanent barrier would be forthcoming. Conversely, the Appellant was of the belief that no further action was required.
5. Following a period of 18 months without receipt of an application for a development permit for building work, Council again conducted a compliance inspection of the swimming pool barrier on 17 November 2022 resulting in the issue of an enforcement notice to the Appellant requiring subsequent rectification works to secure access to the swimming pool.
6. The Appellant, dissatisfied with Council's decision to issue the enforcement notice in light of their previous advice from June 2021, lodged an appeal with the Development Tribunal registry (digitally signed by the Appellant) on 8 December 2022.

Jurisdiction

7. 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.
8. 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.
9. 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.
10. 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

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

Material considered

15. 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 8 December 2022
 - (b) Enforcement notice Reference No. PBEBPC22/0069 dated 22 November 2022 issued by Scenic Rim Regional Council
 - (c) *The Planning Act 2016*
 - (d) *The Planning Regulation 2017*
 - (e) *The Building Act 1975*
 - (f) *The Building Regulation 2021*
 - (g) Queensland Development Code Mandatory Part 3.4 – Swimming Pool Barriers (QDC MP 3.4)

- (h) Verbal submissions from the Appellant at the hearing.
- (i) Verbal submissions from Council's representative at the hearing.
- (j) The Queensland pool safety register.

Findings of fact

16. The tribunal makes the following finding of fact:
- (a) The subject site is a 245.1-hectare allotment situated in an established rural area approximately 10 kilometres to the south-east of the township of Beaudesert in the Scenic Rim Regional Council local government area.
 - (b) A dwelling with attached veranda, attached garages, attached covered walkways, inground swimming pool, tennis court, habitable outbuildings and various farm building are located on the site.
 - (c) Council records show that a building development approval was issued for the construction of the swimming pool on 15 January 2014 and a Form 17 Final inspection certificate – swimming pools and swimming pool fencing was issued on 30 January 2014.
 - (d) The pool safety standard that applies to this swimming pool is the pool safety standard as defined in section 231D of the Building Act, comprising QDC MP 3.4 and any other standard prescribed for ensuring the safety of persons using the pool.
 - (e) The inground swimming pool is located directly adjacent to, and north-west of the dwelling. The attached verandas of the dwelling and the associated covered walkways form the relevant swimming pool barriers.
 - (f) On 28 December 2016, the dwelling was substantially damaged by fire rendering the building uninhabitable and ultimately resulting in the need to demolish, in the first instance, substantial parts of the dwelling.
 - (g) Despite this partial demolition, efforts were made to secure access to the swimming pool by maintaining elements of the existing barrier where serviceable and by the provision of infill temporary fencing.
 - (h) There is no evidence that the building work undertaken to secure access to the swimming pool was authorised by either a pool safety inspector for the purpose of obtaining a pool safety certificate or by a building certifier in granting a development permit for building work.
 - (i) The Appellant purchased the subject site in or about July 2020 and was not the owner of the premises at the time of the fire nor during the initial phase of demolition. A search of the Queensland pool safety register as maintained by the Queensland Building and Construction Commission indicates that no pool safety certificate was in place at the time of the transfer of ownership.
 - (j) Since purchasing the subject site, the Appellant has not chosen to reconstruct the original dwelling and in lieu, a detached class 1a caretaker's residence, located approximately 150m to the north-east of the swimming pool, is currently occupied.

- (k) In response to a complaint, Council conducted a compliance inspection of the swimming pool barrier in May/June 2021, which gave rise to a series of informal emails between Council and the Appellant relating to issues of noncompliance and subsequent rectification attempts that culminated in additional compliance inspections by Council on 11 June 2021 and 24 June 2021.
- (l) Following the inspection of 24 June 2021, Council was satisfied that a temporary fence complying with the requirements of QDC MP 3.4 was in place however, while not formally recorded, was of the expectation that a development permit for building work to formalise a permanent barrier would be forthcoming.
- (m) Following the inspection of 24 June 2021, the Appellant was of the belief that Council was satisfied as to compliance of the swimming pool barriers and that no further action was required.
- (n) Following a period of 18 months without receipt of either an application for a development permit for building work or a notice of engagement from a private certifier, Council again conducted a compliance inspection of the swimming pool barrier on 17 November 2022, at which time the following was noted:
- i. The swimming pool barrier gate closest to the class 1a dwelling was not self-closing or self-latching from all positions;
 - ii. The class 1a dwelling was affected by fire, including the swimming pool barrier. Works had been conducted to the fire affected class 1a building. This work meant that there was no compliant swimming pool barrier directly south of the existing swimming pool. The length of this section was approximately 32 meters; and
 - iii. The CPR sign was located within the garage and was not visible from within the swimming pool enclosure.
- (o) On 22 November 2022, Council issued an enforcement notice requiring the Appellant to:
- (1) Install a temporary safety barrier that complies with the pool safety standard by no later than 2 December 2022; and
 - (2) Undertake the following minor repairs to the pool safety barrier no later than 2 December 2022
 - fix the gate so that it self closes from all open positions including resting against the latch; and
 - relocate the CPR sign so that it is visible from all locations within the swimming pool enclosure; and
 - install a temporary safety barrier that complies with the pool safety standard by no later than 2 December 2022; and
 - (3) Submit an application for a development approval with a private building certifier for a permanent pool safety barrier by no later than 30 January 2023; or
 - (4) Decommission and or remove the swimming pool with a private building certifier by no later than 30 January 2023
- (p) The Appellant is dissatisfied with Council's decision to issue the enforcement notice in the belief that:
- i. the inspection of 24 June 2021 had confirmed that the pool fencing requirements were complied with;
 - ii. Council's inspectors had not been consistent, reliable and credible in the inspection of the pool safety requirements;
 - iii. a show cause notice was not given prior to the issue of the enforcement notice given;

- iv. the offences mentioned in the enforcement notice are inconsistent with the result of the inspection of 24 June 2021;
 - v. the action of the Council's inspector in issuing the enforcement notice potentially constitute contributory negligence noting that the Appellant had relied on the Council's recommendations to fix the pool fencing at that time; and
 - vi. the Council, being an expert party in this case, should know that there is a duty of care in advising the Appellant on the pool safety requirements and the same duty also arose when the Council's inspector confirmed the final works of the pool fencing has been completed and had complied with the pool safety standard provided for in section 232 of the Building Act.
- (q) In formulating the appeal, the Appellant seeks to rely on the doctrine of equitable estoppel and contends that it is unconscionable for the Council to change its position of 24 June 2021 and to issue the notice when the Appellant had relied on the earlier advice and had done all things necessary to comply with the swimming pool provisions in the Building Act.

Reasons for the decision

- 17. The Tribunal is satisfied that swimming pool is a regulated pool as defined by section 231B(1) of the BA.
- 18. Section 232(1) of the BA obliges the owner of a regulated pool to ensure the pool complies with the pool safety standard for the pool and to keep all barriers for the pool in good condition.
- 19. The Tribunal's inspection of the regulated swimming pool confirms that the pool does not comply with the pool safety standard for the pool nor have the barriers been kept in good condition.
- 20. While acknowledging that a degree of confusion ensued in the comprehension of Council's directions, the Tribunal is satisfied that doctrine of equitable estoppel does not apply in relation to statutory obligations arising from the application of Acts and Regulations.

Don Grehan
Development Tribunal Chair

Date: 6 September 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

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