

ENVIRONMENT, RESOURCES AND DEVELOPMENT COURT OF SOUTH AUSTRALIA

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BRIXTON v CITY OF HOLDFAST BAY

[2025] SAERDC 4

Judgment of Commissioner Ryan and Commissioner Kirkham

28 February 2025

**ENVIRONMENT AND PLANNING - PLANNING - DEVELOPMENT
ASSESSMENT AND CONTROL - NOTICES AND ORDERS – ENFORCEMENT**

**ENVIRONMENT AND PLANNING - BUILDING CONTROL - OPERATION OF
STATUTORY CONTROLS – ENFORCEMENT**

**ENVIRONMENT AND PLANNING - COURTS AND TRIBUNALS WITH
ENVIRONMENT JURISDICTION - SOUTH AUSTRALIA - ENVIRONMENT,
RESOURCES AND DEVELOPMENT COURT AND ITS PREDECESSORS -
POWERS ON APPEAL AND REVIEW**

Appeal against an enforcement notice issued by the Council pursuant to s 213 of the Planning, Development and Infrastructure Act 2016 (SA) alleging a breach of s 156 of the Act – the Council alleges that the owner has not ensured that the required designated safety features have been installed and maintained in accordance with prescribed requirements in relation to a swimming pool and spa located on her property – the owner has relied upon a development approval that was issued by the Council following the grant of a building consent by a private certifier - whether the Council can allege that the safety features installed on the land in accordance with that approval are contrary to s 156 of the Act – alleged there can be no breach in those circumstances – alleged the notice is defective as the breach is not sufficiently particularised - whether the obligations of an owner under s 156 of the Act are subject to or avoided by a development authorisation granted under the Act – collateral challenge to the building consent which the Council asserts is a nullity given it is so illogical or irrational that no reasonable decision maker could have approved it – whether the Court has jurisdiction to consider a collateral challenge in these proceedings – approach to the interpretation and application of the relevant provisions of the National Construction Code 2019 Building Code of Australia, Volume 2 (BCA) and the relevant Australian Standards with respect to swimming pool safety considered.

Appellant: SHIRLEY BRIXTON Counsel: MR E GUTHRIE - Solicitor: JOHNSTON WITHERS
Respondent: CITY OF HOLDFAST BAY Counsel: MS M CONDUIT - Solicitor: KELLEDY JONES
Hearing Date/s: 19/08/2024, 20/08/2024
File No/s: ERD-24-000030

B

Held:

1.The appeal is dismissed.

2.Having regard to the text, context and statutory purpose of the provisions of the BCA it is intended that a barrier must be in place between a swimming pool and any Class 1 building located on the land, which would include a Class 1a building (containing habitable rooms) that is located within the pool surrounds of a swimming pool.

3.The inclusion of the words “immediate pool surrounds” in performance requirement P2.7.1(c) of the BCA is a limiting term which seeks to reduce in size the area of land surrounding a swimming pool that is required to be enclosed by a barrier thereby reducing in size the area of land within which a young child is required to be under supervision or surveillance. The immediate pool surrounds would include the area of land surrounding the pool which is directly related to the swimming pool itself and would not include a Class 1a building located within the pool surrounds of a swimming pool.

4.The existing barrier on the land does not comply with the provisions of the BCA (P2.7.1(a) or P2.7.1(c)) or Australian Standard AS 1926.2-2007 because there is no barrier in place between the pool house, a Class 1a building, and the swimming pool and spa located on the property.

5.The owner is in breach of s 156 of the Act because the designated safety features for the swimming pool and spa, which in this case, are the requirements relating to the construction and safety of swimming pools under the relevant provisions of the BCA have not been complied with (reg 6(1)(b) Planning, Development and Infrastructure (Swimming Pool Safety) Regulations 2019 (SA)).

6.An owner’s obligation to comply with s 156 of the Act is not subject to or avoided by a development approval that has been granted to a development application. The swimming pool safety legislation operates outside the development approval process.

7.Upon receipt of the building consent issued by the private certifier, the Council was required to accept that the building consent complied with the Building Rules (s 118(8) Planning, Development and Infrastructure Act 2016 (SA)). Further, subject to satisfying itself that all necessary consents had been obtained, that none of the consents had lapsed and that the consents were consistent, the Council was obliged to grant the necessary development approval to the application given the scheme of the Act (reg 53 (5) Planning, Development and Infrastructure (General) Regulations 2017 (SA)).

8.The enforcement notice issued by the Council was reasonably clear and unambiguous in its terms. The recipient of the notice would have understood the nature of the breach alleged and what she was required to do to rectify the breach. The notice is valid.

Planning, Development and Infrastructure Act 2016 (SA); Planning, Development and Infrastructure (Swimming Pool Safety) Regulations 2019 (SA); Planning, Development and Infrastructure (General) Regulations 2017 (SA); Planning, Development and Infrastructure (Accredited Professionals) Regulations 2019; Legislation Interpretation Act 2021 (SA); Environment Resources and Development Court Act 1993 (SA); National Construction Code 2019, Building Code of Australia, Volume Two, Amendment 1; Australian Standard – Swimming pool safety – Part 1: Safety barriers for swimming pools (AS 1926.1-2012); Australian Standard – Swimming pool safety – Part 2: Location of safety barriers for swimming pools (AS 1926.1-2007), referred to. Amberich Pty Ltd v The City of Mount Gambier [2013] SAERDC 12; Sullivan v District Council of Riverton (1997) 69 SASR 234; City Apartments Pty Ltd v Hall & Others [2001] SASC 337; Garden College v City of Salisbury [2022] SAERDC 10; Jacobs v Onesteel Manufacturing Pty Ltd v Workcover Corporation of SA [2006] 93 SASR 568; Cairo v The Corporation of the City of Norwood Payneham & St Peters & Anor [2018] SAERDC 11; Project Blue Sky Inc and Others v Australian Broadcasting Authority (1998) 194 CLR 355; Charara v Ku-ring-gai Council [2019] NSWLEC 183; Capital Recycling Solutions Pty Ltd v Planning and Land Authority of the Australian Capital Territory [2019] ACTSC 58; Minister for Immigration and Citizenship v SZMDS & Anor (2010) 240 CLR 611; Ousley v The Queen (1997) 192 CLR 69; Liu & Anor v City of Playford [2014] SAERDC 31; Attorney-General (Cth) v Breckler (1999) 197 CLR 83; Minister for Immigration & Multicultural Affairs v Bhardwaj (2002) 209 CLR 597; Jadwan Pty Ltd v Secretary, Department of Health & Aged Care [2003] FCACF 288; Martinovic v Workers Compensation Commission of New South Wales

[2019] NSWSC 1532; *Jackson v Purton* [2011] TASSC 28; *Thorpe v City of Unley* [2006] SAERDC 81, considered.

BRIXTON v CITY OF HOLDFAST BAY
[2025] SAERDC 4

THE COURT DELIVERED THE FOLLOWING JUDGMENT:

Introduction

1 This is a decision of the Court in relation to an appeal commenced by Ms Shirley Brixton (*Ms Brixton* or the *appellant*) against an enforcement notice dated 17 April 2024 (the *Notice*) issued to her by the City of Holdfast Bay (the *Council* or the *respondent*) pursuant to section 213 of the *Planning Development & Infrastructure Act 2016 (SA) (Act)*.

2 The Notice alleges that Ms Brixton has breached the Act by failing to comply with s 156 of the Act with respect to an outdoor swimming pool and spa located on her property. It is alleged that she has not ensured that the required designated safety features have been installed and maintained in accordance with prescribed requirements.¹

3 The appellant challenged the validity of the Notice on a number of grounds, two of which were abandoned prior to the commencement of the hearing.² Three grounds remain extant. First, the appellant denies that she has breached the Act. She contends that the required designated safety features have been installed and are being maintained in accordance with the prescribed requirements. Secondly, she submits that she was granted development approval by the Council on 3 March 2023, and that she has complied with that approval. She argues that her compliance with that development approval does not permit the Council to allege that she has breached s 156 of the Act. Thirdly, she alleges that the Notice is defective as the respondent has not adequately specified or particularised within the Notice how she has failed to comply with the relevant *Australian Standards*³ or the provisions of the National Construction Code (the *NCC*).

4 The Council asserts that Ms Brixton is and remains in breach of the Act, that the Notice is clear and unambiguous and that the appeal should be dismissed. The Council claims that the appellant's failure to erect a swimming pool safety barrier between a pool house (a Class 1a building), and an outdoor swimming pool and spa located on her property, is contrary to the relevant provisions of the NCC. As a result, it is alleged that she has breached s 156 of the Act, regardless of the terms of any development approval granted by the Council. The Council submits that the obligations of an owner under s 156 of the Act are not subject to or avoided by a development authorisation that has been granted under the Act.

¹ *Planning, Development and Infrastructure Act 2016 (SA)*, s 156(3)(a).

² The appellant only pressed grounds 1, 2 and 4 at the hearing. She no longer pressed grounds 3 or 5.

³ *Australian Standard – Swimming pool safety – Part 1: Safety barriers for swimming pools* (AS 1926.1-2012) and *Australian Standard – Swimming pool safety – Part 2: Location of safety barriers for swimming pools* (AS 1926.1-2007).

5 In the alternative, the Council asserts by way of a collateral challenge that the building consent which was granted by a private certifier, which, on the Council's case, resulted in non-compliance with the NCC was so illogical or irrational that no reasonable decision maker could have approved it.⁴ The certifier's decision, as argued by the Council, was therefore the subject of jurisdictional error and was a nullity.⁵

6 The Court makes the following findings. Ms Brixton has breached s156 of the Act. The required designated safety features with respect to the outdoor swimming pool and spa located on her property have not been installed and maintained in accordance with the prescribed requirements. The obligations of an owner under s 156 of the Act are not subject to or avoided by a development authorisation that has been granted under the Act. The Notice was lawfully issued by the respondent and is clear and unambiguous in its terms. Given the decision of the Court in relation to the Notice, it is not necessary to determine the Council's collateral challenge regarding the certifier's decision. In any event, because the private certifier was not a party to the proceedings and was not given an opportunity to make submissions to the Court and to respond to the collateral challenge, we do not consider that it would be appropriate for the Court to rule on that issue in the circumstances of this particular case.⁶

Background

The Land

7 Ms Brixton is the registered proprietor of the land located at 30 Partridge Street, Glenelg being the land comprised within Certificate of Title Register Book Volume 5667 Folio 694 (the *Land*). She became the owner of the Land in 2016. The Land has a frontage to Partridge Street and otherwise shares its boundaries with other adjoining residential properties.

8 Located on the Land is a two storey detached dwelling (the *Dwelling*), an outdoor swimming pool (the *Pool*), a spa (the *Spa*) and a pool house (the *Pool House*). The Pool, the Spa and the Pool House are sited behind the Dwelling towards the rear of the Land (the *Pool Area*). A glass pool fence containing a child resistant gate (the *Gate*) separates the Pool Area from the Dwelling. Critically, on the appellant's case, there is no other way in which the Pool Area can be accessed, other than through the Gate.

9 Once inside the Pool Area, access from the Pool House to the Pool and the Spa is open and unimpeded, that is, there is no barrier in place separating the Pool House from the Pool and the Spa. The central issue in these proceedings is whether

⁴ *Minister for Immigration and Citizenship v SZMDS & Anor* (2010) 240 CLR 611.

⁵ *Cairo v The Corporation of the City of Norwood Payneham & St Peters & Anor* [2018] SAERDC 11.

⁶ *Jacobs v OneSteel Manufacturing Pty Ltd* [2006] 93 SASR 568, [93]-[94].

it is a requirement of the NCC that a safety barrier is required to be in place preventing access from the Pool House to the Pool and the Spa.

10 The appellant submits that the safety barrier that is located on the Land, which currently separates the Pool Area from the Dwelling, satisfies the requirements of the relevant *Australian Standards*.⁷ She submits that there is no way to access the Pool and the Spa other than through the safety barrier that currently exists on the Land. She asserts that this existing barrier is compliant with and satisfies the requirements of the *Australian Standards*.⁸

History of development approvals

11 It is necessary to set out the details of two development approvals that have been granted in relation to the Land in 2014 and more recently in 2023.

2014 Approval

12 On 3 July 2014, development application number 110/00480/14 was submitted to the Council, being an application for a development described as the “*construction of a two storey detached dwelling with integrated garage with a wall height of 3 metres and wall length of 6.5 metres sited on the southern side boundary, swimming pool and spa⁹ in yard and re-roof existing outbuilding*” on the Land (the *2014 Development*). On 10 September 2014, a Development Plan consent was granted to the 2014 Development subject to ten conditions. On 23 October 2014, a Building Rules consent was granted to the 2014 Development subject to four conditions.¹⁰ The Building Rules consent was granted by a private certifier Professional Building Services Australia Pty Ltd (*PBS*) and not the Council. Following the grant of all necessary consents, a development approval was then issued by the Council on 30 October 2014.¹¹ The 2014 Development was assessed and determined under the *Development Act 1993* (SA) (now repealed).

13 The site plan which was granted Building Rules consent and development approval shows the approved swimming pool (the Pool) located towards the rear of the Land.¹² The site plan also depicts a 1.2m high glass pool fence and gate which restricts access to the Pool from the approved dwelling (the Dwelling).¹³ The Pool House is also shown on this site plan (referred to as an existing outbuilding *to be refurbished* on the development application form).¹⁴ The dimensions of the Pool House, as approved, indicate that it has a floor area of some 125 m² approximately¹⁵ which equates to one third of the total floor area of the

⁷ Appellant, Written submissions of appellant, dated 16 August 2024, [6].

⁸ Ibid, [8].

⁹ The spa was proposed to be located within the pool itself and was not a separate structure which was described as “*sitting edge with spa jets*”, see Exhibit R1 at [133].

¹⁰ Exhibit R1, at [119]-[122].

¹¹ Ibid, at [114]-118].

¹² Ibid, at [127].

¹³ Exhibit R1 at [127], [133] and [314].

¹⁴ Exhibit R1 at [314].

¹⁵ Ibid at [134], i.e., 12.19m x 10.21m = 124.4599.

Dwelling (upper and lower floor levels combined).¹⁶ The approved plans depict both the existing and proposed southern elevation of the Pool House.¹⁷ As approved, the proposed southern elevation of the Pool House included a “*new aluminium sliding stacker door*” together with a set of 2400mm high fixed windows and further to the east, a sash window with a restricted opening. On this approved plan, there is no access provided to the Pool from the Pool House because the aluminium sliding stacker door of the Pool House is located *outside* the approved 1.2m high glass pool fence.¹⁸ The approved 1.2m high glass pool fencing is described as including a “*dog-leg design*” which specifically excludes the aluminium sliding stacker door of the Pool House.¹⁹

- 14 As approved in the 2014 Development, the only way in which the Pool could be accessed was through a child resistant gate which was located within the safety barrier.²⁰ There is no dispute that the safety barrier approved through the 2014 Development complied with the prescribed requirements in force at that time.²¹ As of 29 June 2016, the Dwelling, the Pool House, the Pool and a compliant pool safety barrier had all been constructed on the Land, in accordance with the approved 2014 Development.²²

2023 Approval

- 15 On 3 March 2023, development application number 23004601 was granted a development approval by the Council pursuant to the provisions of the Act. The nature of the development on the decision notification form was described as a *swimming pool* on the Land.²³ The 2023 Development is more accurately described as an *inground concrete spa and safety fence* (the *2023 Development*). The development approval granted to the 2023 Development comprised a planning consent granted by the respondent’s Assessment Manager on 24 February 2023, subject to two conditions and a building consent, once again granted by PBS, on 27 February 2023, subject to seven conditions. The 2023 Development included the construction of an in ground concrete spa located beside the Pool within the Pool Area (the Spa) and the removal of a portion of the previously approved swimming pool safety barrier, resulting in a reconfigured safety barrier.

- 16 The approved site plan shows the section of the safety barrier that was to be removed, namely the *dog leg* section referred to earlier, and the location of the

¹⁶ Ibid at [127], see site coverage calculations which provide that the ground floor (inc. porch) has a floor area of 245m² and the first floor has a floor area of 145m².

¹⁷ Ibid, at [133].

¹⁸ Ibid.

¹⁹ Exhibit R7, [13.1].

²⁰ Respondent, Outline of submissions, dated 16 August 2024, [4]; Appellant, Written submissions of appellant, dated 16 August 2024, [13].

²¹ Exhibit R7, [8].

²² FDN12, [2] and [5].

²³ Exhibit R1 at [329]-[333]. Under the Act, a “*swimming pool*” includes a “*spa pool*”, *Planning, Development and Infrastructure Act 2016* (SA), s 3.

newly reconfigured pool safety barrier.²⁴ A copy of the approved site plan which depicts the location of the barrier as approved in 2014 (shown with a dashed light blue line) and the reconfigured barrier approved in 2023 (shown with a solid darker blue line incorporating a child resistant safety gate shown in red), is attached to this decision.

17 The approved site plan also identifies the location of the “sliding door” of the Pool House which was previously located *outside* the 2014 barrier. There is a note on the approved site plan, beside the sliding door of the Pool House, which provides that it would be “*the only opening and access in the entertainment room*”:

18 As approved in 2023, the only way in which access could be obtained to the Pool Area from the Dwelling (a Class 1 building) was, once again, through a child resistant safety gate, located within the reconfigured pool safety fence. As approved in 2023, it was now possible to access the Pool and the Spa directly from the Pool House, because the aluminium sliding stacker doors of the Pool House were now located inside the reconfigured 1.2m high glass pool fence.

2023 inspection

19 On 17 May 2023, the Council was notified that construction of the 2023 Development had commenced on the Land.²⁵ On 19 October 2023, a Council building officer, Mr Richard Neaylon (*Mr Neaylon*) inspected the Land. Mr Neaylon observed that as a result of the reconfigured pool safety barrier there was now *direct access* to the Pool and Spa through the glass sliding doors of the Pool House. Mr Neaylon formed the view that the relocation of the approved 2014 safety barrier constituted a breach of section 156(4) of the Act.²⁶

20 Following his inspection, Mr Neaylon emailed Mr Grant Riches of PBS and advised him of his concerns with respect to the removal and relocation of the approved 2014 safety barrier.²⁷ Mr Riches sent an email in response advising that PBS had approved the alteration to the safety barrier as a ‘minor’ variation pursuant to regulation 65 of the *Planning, Development and Infrastructure (General) Regulations 2017 (SA)* (the *General Regulations*) and that the reconfigured barrier complied with the *Australian Standards*.²⁸ According to the decision notification form, the building consent granted by PBS was not assessed as a *minor variation* pursuant to r 65 of the General Regulations. The 2023 Development was submitted as a fresh development application. It does not appear to have been described or assessed as a variation application (minor or otherwise) by PBS. Nothing turns on whether the application was a fresh application or a variation application in any event.

²⁴ Ibid at [334].

²⁵ Exhibit R7, [12].

²⁶ Exhibit R7, [13.3].

²⁷ Ibid, [14].

²⁸ Ibid.

21 The Council alleges that the building consent granted by PBS on 27 February 2023 does not comply with the NCC. It contends that the decision to grant building consent to the 2023 Development was so illogical or irrational that no relevant authority, acting reasonably, could have approved it.²⁹ Notwithstanding, the Council granted a development approval to the 2023 Development upon receipt of the privately certified building consent. That decision by the Council to grant development approval to the 2023 Development related to one of the appellant's grounds as to why the Notice should be quashed and why the appeal ought to be allowed (ground 4).

22 The appellant asserts that she has complied with the terms of the 2023 Development which was granted a development approval by the Council. That approval permits direct access to the Pool and the Spa from the Pool House. She claims that it cannot be the case that she has breached or is currently in breach of her legal obligations under s 156 of the Act.

The view

23 At the commencement of the hearing, a view of the Land was undertaken. What was observed and said at the view is not evidence. The view enabled the Court to understand the general layout of the Pool Area, the location of the Pool, the Spa and the Pool House on site, together with the features of the existing safety barrier in place on the Land which currently separates the Dwelling from the Pool Area, as approved through the 2023 Development. The Court also observed the Pool and the Spa and the area surrounding the pool generally from within the Pool House itself. Mr Neaylon later gave evidence about his observations.

The hearing

24 The appellant did not call any witnesses nor did she give evidence herself. The respondent called one witness, Mr Neaylon. His evidence was given by affidavit, supplemented by oral evidence. He was cross-examined by counsel for the appellant. He gave evidence about the background to the matter, leading up to the issue of the Notice, the circumstances surrounding the development approval granted by the Council to the 2023 Development, and how he considered the provisions of the NCC and the *Australian Standards* should be interpreted. We accept Mr Neaylon as an honest and credible witness.

The Legislative Scheme

The Act and associated regulations

25 Section 156 of the Act sets out the legislative framework with respect to swimming pool safety in South Australia. The section must be read in conjunction with the *Planning, Development and Infrastructure (Swimming Pool Safety) Regulations 2019* (the *SPS Regulations*). Section 156 of the Act sets out the

²⁹ *Minister for Immigration and Citizenship v SZMDS & Anor* (2010) 240 CLR 611.

designated safety requirements for swimming pools. A failure to comply with these requirements constitutes a breach of the Act.³⁰ Section 156 provides:

- (1) In this section—
designated owner means—
 - (a) in relation to a swimming pool—
 - (i) if the swimming pool is a fixture to, or forms part of, land—the owner of the land;
 - (ii) in any other case—the owner of the structure that constitutes the swimming pool; and
 - (b) in relation to a building—the owner of the building;

...
- (2) Without limiting any provision of the Building Code or a Ministerial building standard, the regulations may specify requirements that are to apply in relation to designated safety features for swimming pools or buildings.
- (3) In particular, the regulations may—
 - (a) require a designated owner of a swimming pool or building to ensure that designated safety features are installed and maintained in accordance with prescribed requirements; and
 - (b) require the owner of an existing swimming pool or building—
 - (i) to ensure that designated safety features are installed, replaced or upgraded before, or on the occurrence of, a prescribed event; or
 - (ii) to install, replace or upgrade designated safety features within a prescribed period.
- (4) A person who contravenes, or fails to comply with, a requirement under this section (including a requirement prescribed by the regulations) is guilty of an offence.
Maximum penalty: \$15 000.

...

26 The following terms defined in s 3 of the Act assist in the interpretation and application of s 156 of the Act:

- designated safety features** means—
- (a) in relation to a swimming pool—swimming pool safety features; and
 - (b) in relation to a building—safety features relating to the use or occupation of a building;

...

swimming pool means an excavation or structure that is capable of being filled with water and is used primarily for swimming, wading, paddling or the like and includes a bathing or wading pool or spa pool (but not a spa bath);

swimming pool safety features means a fence, barrier or other structure or equipment prescribed by the regulations for the purposes of this definition;

³⁰ *Planning, Development and Infrastructure Act 2016 (SA)*, s 156(4).

...

27 The SPS Regulations set out the prescribed designated safety features for swimming pools pursuant to s 156(2) of the Act. Such features depend upon a number of different factors identified in r 6(1). Regulation 6 of the SPS Regulations provides:

- (1) For the purposes of section 156(2) of the Act, the following requirements are prescribed:
 - (a) in relation to a swimming pool approved, constructed or installed before 1 July 1993—the requirements set out in a Ministerial building standard published for the purposes of this regulation;
 - (b) in relation to any other swimming pool—the requirements relating to the construction and safety of swimming pools under the Building Code, as it applied at the time the application for a relevant consent or approval was made (being an application that related to the construction of the swimming pool or to some other form of building work where designated safety features are relevant).
- (1a) For the purposes of section 156(3)(a) of the Act—
 - (a) the requirements under subregulation (1) are prescribed; and
 - (b) the designated owner of a swimming pool must ensure that designated safety features are installed and maintained in accordance with the relevant requirements under subregulation (1).
- (2) For the purposes of section 156(3)(b)(i) of the Act, the designated owner of an existing swimming pool must ensure that designated safety features are installed in accordance with the relevant requirements under subregulation (1) before the occurrence of a prescribed event.
(Our underlining).

28 Regulation 4 of the SPS Regulations further defines swimming pool safety features as follows:

- (1) For the purposes of the definition of *swimming pool safety features* in section 3(1) of the Act, the following features are prescribed (insofar as they are relevant to the particular circumstances taking into account the provisions of the Building Code):
 - (a) fences;
 - (b) barriers;
 - (c) water recirculation systems;
 - (d) secondary outlets from a swimming pool;
 - (e) warning notices.

...

29 The Pool and the Spa were both approved, installed or constructed *after* 1 July 1993. The designated safety features required to be installed and maintained

in relation to the Pool and the Spa are those identified in r 6(1)(b) of the SPS Regulations, namely, the requirements relating to the construction and safety of swimming pools under the Building Code, as it applied at the time the applications for the relevant consents or approvals were made.³¹

The National Construction Code (NCC)

30 The NCC is published in three volumes. The Building Code of Australia (BCA or the *Building Code*) is Volume One and Two of the NCC. The Plumbing Code of Australia is Volume Three of the NCC.³² The *Building Code* referred to in r 6(1)(b) of the SPS Regulations, may be taken to be a reference to the NCC.

Building classifications

31 The NCC is a performance based code which sets out the technical requirements for the construction of buildings in Australia. In doing so, it groups buildings according to the purpose for which they are designed, constructed or adapted to be used rather than the function or use they are put to,³³ assigning each type of building or structure with a building classification. Throughout the NCC, buildings are referred to by their building classification. The particular assignment of a building classification to a building or structure plays an integral role in the interpretation and the application of the provisions of the NCC.

32 Building classifications are labelled ‘Class 1’ through to ‘Class 10’. Within some classifications, there are sub classifications, usually identified by a letter after the classification number, for example Class 1a. A reference to a building class is understood to be a reference to all the sub-classifications of that class.³⁴ However, a reference to a sub-classification within the NCC is solely to that sub-classification.³⁵ Relevantly, in this case, a Class 1a building is a sub-classification of a Class 1 building.³⁶

33 Class 1 and 10 buildings, being residential type buildings are covered in Volume 2 of the NCC, whereas Class 2 to Class 9 buildings, being generally of commercial type construction, are covered in Volume 1 of the NCC.³⁷

³¹ *Planning, Development and Infrastructure (Swimming Pool Safety) Regulations 2017* (SA), r 6(1)(b).

³² NCC 2019 Volume Two, Amendment 1, Introduction to the National Construction Code, Format of the NCC, at [8].

³³ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, *Introduction to this Part*, at [28].

³⁴ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation (4), at [14].

³⁵ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation (6), at [15].

³⁶ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation (5)(a), at [14].

³⁷ NCC 2019 Volume Two, Amendment 1, Introduction to the National Construction Code, Components of the NCC, at [8].

34 Compliance with the NCC is achieved by adhering to both the *governing requirements* and meeting the *performance requirements* of the NCC.³⁸ In order to meet her legal obligations under s 156 of the Act, as previously identified, the designated safety features which the appellant is required to have installed and maintained in relation to the Pool and the Spa on the Land are those relating to the construction and safety of swimming pools *under the Building Code* as it applied at the time the application for the relevant consents or approvals were made.³⁹

Performance requirements

35 Performance requirements for the construction of buildings outline the minimum necessary standards different buildings or building elements *must* attain and are the technical provisions that *must* be satisfied.⁴⁰ A building will comply with the provisions of the NCC if it satisfies the performance requirements. A performance requirement can be met using either a performance solution, a deemed-to-satisfy solution or a combination of both.⁴¹ A solution that complies with the deemed-to-satisfy provisions is deemed to have met the performance requirements.⁴² A performance solution as defined in the NCC (alternative solution) is a means of complying with the performance requirements other than by way of a deemed-to-satisfy solution.⁴³

Relevant provisions of the NCC

36 The version of the NCC which applied in relation to the assessment and determination of the 2023 Development was the *NCC 2019 Building Code of Australia – Volume Two, Amendment 1* (referred to hereafter as the *Building Code*). The most relevant provisions of the Building Code were included in the respondent’s book of documents which were tendered.⁴⁴ The performance provisions of the Building Code contained in Section 2⁴⁵ contain the *performance requirements* for Class 1 and 10 buildings.

37 A Class 1a building is defined in the Building Code to include “*one or more buildings, which together form a single dwelling including...a detached house*”.⁴⁶ Figure 3 within the governing requirements of the Building Code attempts to

³⁸ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A2 Compliance with the NCC, A2.0 Compliance, at [16].

³⁹ *Planning, Development and Infrastructure (Swimming Pool Safety) Regulations 2019* (SA), r 6(1)(b).

⁴⁰ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A2 Compliance with the NCC, A2.4, A combination of solutions (Explanatory Information) at [17].

⁴¹ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A2 Compliance with the NCC, A2.1 Compliance with the Performance Requirements, at [16].

⁴² *Ibid.*

⁴³ NCC 2019 Volume Two, Amendment 1, Schedule 3 Definitions, *Performance Solution*, at [512].

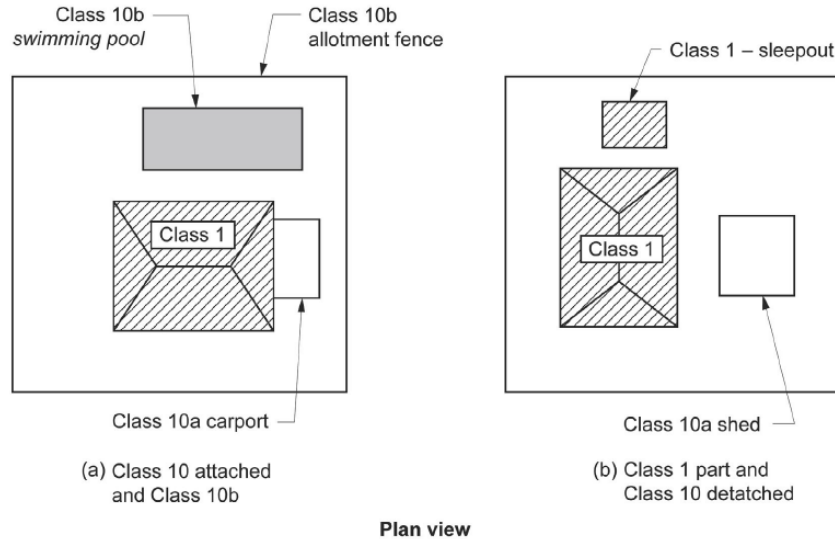
⁴⁴ Exhibit R1 at [8]-[11].

⁴⁵ NCC 2019 Volume Two, Amendment 1, Section 2 Performance Provisions, at [40] – [76].

⁴⁶ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, A6.1 Class 1 buildings, at [28].

demonstrate the different ways in which Class 1 and 10 buildings may be classified on land that is used for residential purposes:

Figure 3: Domestic allotment – Classification of buildings and structures



38 As illustrated⁴⁷ a dwelling and a separate detached building on the same allotment in the nature of a sleepout, as shown in the example, are both considered to be a Class 1 building. Having regard to the definition of a Class 1a building in the Building Code, they are considered together to form a single dwelling. An attached carport or a detached shed are identified as Class 10a buildings. A swimming pool or a fence are identified as Class 10b buildings.

39 The relevant performance provisions relating to access to *swimming pools* are listed in Section 2, within Part 2.7, of the Building Code.⁴⁸ The following provisions are set out in advance of the listed (mandatory) performance requirements:

Part 2.7

Explanatory Information

Objective

O2.7

The Objective is to –

⁴⁷ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, A6.1 Class 1 buildings, Figure 3, at [31].

⁴⁸ NCC 2019 Volume Two, Amendment 1, Section 2 Performance Provisions at [71] – [72]; Exhibit R1 at [8-9].

(a) safeguard young children from drowning or injury in a *swimming pool*⁴⁹; and

...

Application

O2.7(a) ... only apply to a *swimming pool* with a depth of water more than 300mm

...

Functional statements

F2.7.1 Swimming pool access

A *swimming pool* is to be provided with –

(a) means to restrict access to it by young children;

...

40 The following *performance requirements* apply with respect to the objectives and functional statements listed above:

Performance Requirements

P2.7.1 Swimming pool access

A barrier must be provided to a *swimming pool* and must –

(a) be continuous for the full extent of the hazard; and

(b) be of a strength and rigidity to withstand the foreseeable impact of people; and

(c) restrict access of young children to the pool and the immediate pool surrounds;
and

(d) have any gates and doors fitted with latching devices not readily operated by young children, and constructed to automatically close and latch.

41 As stated previously, compliance with the Building Code is achieved through meeting the performance requirements of the NCC. The requirements which relate to the construction and safety of swimming pools under the Building Code referred to in r 6(1)(b) of the SPS Regulations include those which are set out in P2.7.1, listed above.

⁴⁹ “*swimming pool*” is defined in Schedule 3 of Volume Two of the NCC to mean: *any excavation or structure containing water and principally used, or that is designed, manufactured or adapted to be principally used for swimming, wading, paddling, or the like, including a bathing or wading pool, or spa, at [518].*

42 Part 3.10.1.0 of the Building Code⁵⁰ lists the following *acceptable construction manuals*⁵¹ with respect to the *performance requirements* in P2.7.1. Acceptable construction manuals are deemed-to-satisfy referenced documents. It provides:

Acceptable Construction Manuals

3.10.1.0

- (a) *Performance Requirement 2.7.1* is satisfied for a *swimming pool* with a depth of water more than 300mm and which is associated with a Class 1 building, if it has safety barriers installed in accordance with AS 1926.1 and AS 1926.2

...

(Our underlining)

43 There are some State and Territory listed variations under Part 3.10.1.0, which provide that in some cases there are further and/or different regulations which may apply. Presently there are none listed that apply in South Australia relevant to the determination of this matter.

44 Part 3.10.1.0 is a deemed-to-satisfy provision of the Building Code.⁵² As we have previously identified, a solution that complies with a deemed-to-satisfy provision meets the relevant performance requirements of the Building Code which are those listed in P2.7.1. Provided a swimming pool *that is associated with a Class 1 building*⁵³ has a safety barrier which complies with AS1926.1 and AS 1926.2, it will be deemed to have met the *performance requirements* in P2.7.1 of the Building Code.

45 The appellant's case is that the barrier in place on the Land complies with AS1926.1 and AS 1926.2. She therefore contends that the performance requirements of the Building Code *are* met (through the deemed to satisfy solution in Part 3.10.1.0) and so there can be no breach of r 6(1)(b) of the SPS Regulations or s 156 of the Act.

The Australian Standards

46 AS 1926.1 and AS 1926.2 referred to in Part 3.10.1.0 (a) of the Building Code is a reference to the Australian Standards that apply in this case, namely;

⁵⁰ NCC 2019 Volume Two, Amendment 1, Section 3 Acceptable Construction, at [334] – [335]; Exhibit R1 at [10-11].

⁵¹ In Section 3 of Volume Two of the NCC the *deemed-to-satisfy provisions* are divided into two compliance pathways; "*acceptable construction practices*" and "*acceptable construction manuals*". "*Acceptable construction practices*" are some of the most common forms of national construction practice and are written into Section 3. "*Acceptable construction manuals*" are the deemed-to-satisfy referenced documents (NCC 2019 Volume Two, Amendment 1, Section 3 Acceptable Construction, *How to use Section 3*).

⁵² Ibid.

⁵³ NCC 2019 Volume Two, Amendment 1, Section 3 Acceptable Construction, 3.10.1.0 (a) at [334]; Exhibit R1 at [10].

Australian Standard – Swimming pool safety – Part 1: Safety barriers for swimming pools (AS 1926.1-2012) and Australian Standard – Swimming pool safety – Part 2: Location of safety barriers for swimming pools (AS 1926.1-2007).

47 The relevant Australian Standards were included in the respondent's tendered book of documents.⁵⁴ AS 1926.1-2012, (being Part 1 of the Standards), sets out the design and construction elements, and the *technical requirements* of a barrier, amongst other matters. The preface to AS 1926.1-2012,⁵⁵ includes the following:

The objective of this Standard is to assist pool owners/users in avoiding pool-related drowning by providing design, construction and performance of various barrier options, which are designed to restrict entry to the swimming pool area by young children.

...

Statistical evidence shows that the majority of drowning deaths in private swimming pools involve children under five years of age. For this reason, the requirements established by this Standard are directed at achieving a barrier that will make it difficult for a young child to gain access to a pool area, whether under, over or through the barrier.

It should be noted that the provisions of this Standard related to barriers that are intended to be child resistant but not childproof, as effectiveness of the barrier is very much dependent on its location, installation and maintenance.

The requirements are established with the intention of leaving a high degree of flexibility to the consumer in the choice of a barrier, desirable aesthetics and cost.

...

(Our underlining).

48 Part 2 of the Australian Standards, AS 1926.2-2007, sets out the *locational requirements* for barriers. The preface to AS 1926.2-2007 includes the following:

The objective of this Standard is to assist pool users/owners in avoiding pool-related drowning by providing options for the location of pool barriers, which are designed to deny, delay or detect unsupervised entry to the swimming pool area by young children.⁵⁶

(Our underlining).

49 AS 1926.2-2007 sets out the options for the location of safety barriers intended to restrict the access of young children to swimming pools.⁵⁷

⁵⁴ Exhibit R1 at [49]-[113].

⁵⁵ Ibid at [52].

⁵⁶ Exhibit R1 at [101].

⁵⁷ Ibid at [103], under heading *I. Scope*.

50 It was submitted that AS 1926.2-2007 is the most relevant of the two parts of the Standards which apply in this matter. The latest version of Part 2 of the Standards was published in 2007. It is the Standard which applied to both the 2014 Development and the 2023 Development.

51 It was not in dispute that the Pool and the Spa each fall within the definition of an *outdoor pool* as that term is defined⁵⁸ in the Standards. Clause 4 of AS 1926.2-2007⁵⁹ sets out the options for the location of barriers and provides typical examples of outdoor pool barrier locations. It provides, in part:

4 OPTIONS FOR LOCATION OF BARRIERS

4.1 General

All barriers shall comply with AS 1926.1.⁶⁰ The location of barriers shall comply with clauses 4.2, 4.3 or 4.4⁶¹ as applicable.

4.2 Outdoor pools

A child resistant doorset shall not be installed in a barrier for an outdoor pool. The openable portion of any window in a barrier shall comply with AS 1926.1.

A balustrade on a balcony projecting into any NCZ shall comply with AS 1926.1.

Typical examples of barrier locations are given in Figure 2.1.

⁵⁸ An *outdoor pool* is defined as “a pool that is neither fully nor partly enclosed by a building”, Exhibit R1 at [104].

⁵⁹ Exhibit R1 at [104-107].

⁶⁰ Noting again that AS 1926.1 is concerning with the design and construction and the technical requirements of a barrier.

⁶¹ Clause 4.3 and 4.4 have no application in this matter.

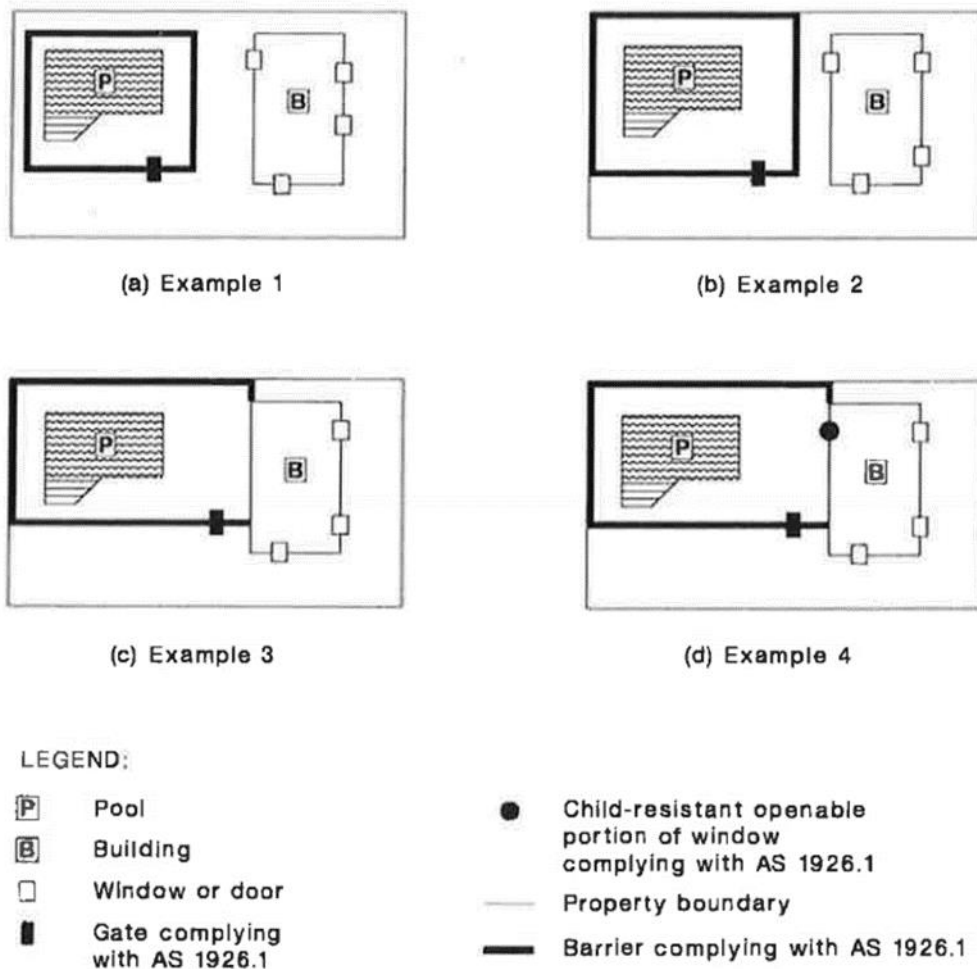


FIGURE 2.1 TYPICAL EXAMPLES OF OUTDOOR POOL BARRIER LOCATIONS

52 In these examples, “B” represents a “Building”. We note that there is nothing to suggest in the examples provided or the text of the provisions that “B” only represents a single detached dwelling on an allotment, and that “B” does not represent, for example, a separate detached building which forms part of the Class 1 building, such as a sleepout (or a similar Class 1a building). If “B” was only representative of a house, the diagrams and the legend used to explain the different elements within the diagrams could have been drafted to reflect that intended interpretation.

53 The following definitions are relevant to the interpretation of Part 2 of the Standards which are set out in AS 1926.2-2007:⁶²

⁶² Exhibit R1 at [103-104].

3.1 Barrier

The assembly of components, natural or otherwise, that restricts access to the pool, including items such as fences, posts and panels, gate units, gates and doorsets, constructed or natural walls (retaining or otherwise), sides of buildings, and balustrades on a balcony, where they form part of the intended barrier.

3.2 Child resistant doorset

A doorset that comprises a door, door frame, self-closing device and self-latching device, that is designed to provide an access way from the building to an indoor pool.

...

3.8 Indoor Pool

A pool that is fully enclosed within a residential building or a separate building.

...

3.10 Outdoor Pool

A pool that is neither fully nor partly enclosed by a building.

3.11 Indoor/outdoor pool

A pool that is partly enclosed by a building and partly an outdoor pool.

3.12

Pool area

The area that contains the pool and is enclosed by a safety barrier.

...

54 A “pool area” is a defined term in the Australian Standards. It is not a defined term or phrase in the Building Code, nor does it appear in the performance requirements of the Building Code with respect to swimming pool safety. P2.7.1(c) provides that a barrier must restrict access by young children to the pool *and* the immediate pool surrounds, it does not refer to “the pool area”.

55 In both Parts 1 and 2, the following explanatory information is provided to assist in the interpretation of the Standards:

The terms ‘normative’ and ‘informative’ have been used in this Standard to define the application of the appendix to which they apply. A ‘normative’ appendix is an integral part of the Standard, whereas [in] an ‘informative’ appendix is only for information and guidance.⁶³

⁶³ Ibid at [52] and [101].

56 Guidance on factors to be considered in the selection of the location of barriers is set out in Appendix B to Part 2 of the Standards (*Appendix B*).⁶⁴ Appendix B is an *informative* appendix and thus is for information and guidance purposes only. It provides:

The distance of the barrier from the pool should take into consideration a safety margin sufficient to discourage diving and jumping from the barrier into the pool. The barrier should be located to enable adult supervision from within the pool area. Whenever a young child is inside a pool area, constant supervision is essential.

Where possible, tool sheds, garages, barbecues and clotheslines should be located outside the pool area to reduce the likelihood of self-closing gates being propped open in order to gain access.

...

The type of barrier and location of the pool within the property should permit viewing through or over the barrier so that the pool area may be directly viewed from commonly used areas of the building or yard.

...

The Pool House

Building classification

57 Under the Building Code, and as illustrated in the extract from the Building Code in Figure 3 within the governing requirements shown above, a single Class 1 dwelling may comprise *more than one* building. For example, it may include a detached house, plus one or more habitable outbuildings, such as a sleepout, as shown in the example provided in Figure 3.⁶⁵

58 A *habitable building* cannot be classified as a Class 10 building.⁶⁶ A Class 10 building is a *non-habitable* building.⁶⁷ Some examples of a non-habitable building are; a garage, carport or shed. Class 10b buildings are non-habitable structures.⁶⁸ Some examples of these are swimming pools and fences.

59 The Building Code does not define what a *habitable building* is. It does however define a *habitable room* as follows:

a room used for normal domestic activities, and –

⁶⁴ Exhibit R1 at [108].

⁶⁵ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Explanatory Information, at [33].

⁶⁶ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Explanatory Information, at [33].

⁶⁷ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Part 6.10 Class 10 buildings and structures, (1) at [32].

⁶⁸ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Part 6.10 Class 10 buildings and structures, (2) at [32].

- (a) includes a bedroom, living room, lounge room, music room, television room, kitchen, dining room, sewing room, study, playroom, family room, home theatre and sunroom; but
- (b) excludes a bathroom, laundry, water closet, pantry, walk-in wardrobe, corridor, hallway, lobby, photographic darkroom, clothes-drying room, *and other spaces of a specialised nature occupied neither frequently nor for extended periods.*⁶⁹

(Our emphasis).

60 A habitable outbuilding which is appurtenant to another building is generally part of that building.⁷⁰ The explanatory information within the governing requirements of the Building Code provides:

Typical outbuilding classifications include the following:

- (1) A sleepout on the same allotment as a Class 1 building is part of the Class 1 building.
- (2) A detached entertainment room on the same allotment as a Class 1 building, perhaps associated with a swimming pool, is part of the Class 1 building.
- (3) A small toolshed, used for trade-related hobbies for non-commercial purposes or home repairs, on the same allotment as a Class 1 building, would be classified as a Class 10 building.⁷¹

(Our underlining).

61 It was not in dispute that the Pool House is a Class 1a, habitable outbuilding, under the Building Code.⁷² Whilst a sleepout is not defined in the Building Code, the Macquarie dictionary defines a “sleep-out” as “*a separate outbuilding used as sleeping quarters*”.⁷³ The Pool House could be used as a sleepout. It has been designed and constructed in a way such that it could be adapted for such a use⁷⁴ even if it is not presently being used as such. Given the enclosed and weather proofed nature and layout of the Pool House, there is no reason why it could not be used as a sleepout.

62 Regardless of whether or not it could be considered to be a sleepout, the Pool House is a detached building which, while separate from the Dwelling on the Land, is a building containing *habitable rooms* which can be *used* for entertainment purposes, for example a lounge room, television room or home theatre room, etc. A detached *entertainment room* on the same allotment as a Class 1 building is part of the Class 1 building. A detached outbuilding containing more than one such

⁶⁹ NCC 2019 Volume Two, Amendment 1, Schedule 3, Definitions at [509].

⁷⁰ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Explanatory Information, at [37].

⁷¹ Ibid.

⁷² T56 lines 36-38, T57 line 1.

⁷³ *Macquarie Dictionary* (online at 29 January 2025) ‘sleep-out’, def. 2

⁷⁴ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, *Introduction to this Part*, at [28].

room must also fall within the same building classification. We have determined that the Pool House can be described as a typical outbuilding which may be considered to be a part of the Class 1 building on the Land, the Dwelling. As previously identified, a Class 1a building is one or more buildings, which together form a single dwelling.⁷⁵ The Court finds that the Pool House is a Class 1a building.

63 The reference to a Class 1 building in Part 3.10.1.0 (a) of the Building Code includes all sub classifications for that building classification,⁷⁶ including a *Class 1a* building, which in this case, *includes the Pool House*.

Observations on the view and Mr Neaylon's evidence

64 On the view, the Court accessed the Pool Area through the Gate and then entered the Pool House. The Pool House contained four (4) separate rooms, two of which were much larger than the others. The smaller two rooms (which were connected to only one of the two main larger rooms) were (1) a bathroom, containing a shower, vanity and toilet, and a (2) a pool equipment room, both rooms being non-habitable rooms, as defined. The south facing elevation of the larger two main rooms contained mostly floor to ceiling glass facing out to the Pool Area. These two main rooms were separated internally by a dividing wall. They were each an *habitable room* as defined in the Building Code. They could each be *used* as a living room, dining room, bedroom, study, television room, home theatre room, etc.

65 The Court entered the Pool House through the set of glass sliding doors which led to the first of the two main habitable rooms. When positioned in this first habitable room it was not possible to see the whole of the Pool or the whole of the Pool Area because the dividing wall obstructed that view. Mr Neaylon gave evidence that when standing in the northwestern corner of this first main room, approximately 15% of the Pool could not be seen. A greater percentage of the Pool Area was also not visible from this location.⁷⁷ Moving eastwards within the same room and when positioned closer to the dividing wall which separates the two main rooms, from this location Mr Neaylon said that approximately 30% of the Pool could not be seen and less of the surrounding pool area.⁷⁸ We agree with those approximations. Depending on where a person is located in the first main habitable room of the Pool House, between 15% to 30% of the Pool could not be observed.

66 In the second of the two main habitable rooms, it was also not possible to see the entire Pool and the surrounding pool area. Again, the visibility of the Pool in this room was dependent on where a person was located when looking out to the

⁷⁵ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A6 Building Classification, Part 6.1 Class 1 buildings, (1) at [28].

⁷⁶ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation (4)

⁷⁷ T12 lines 35-38 and T13 lines 1-3.

⁷⁸ T13 lines 13-22.

Pool. Visibility of the Pool was further reduced in part in this room due to the presence of a floor to ceiling nib wall which measured 1.5m (wide) x 2.7m (high) located between the fixed south facing glass window panels and the adjacent dividing wall. Mr Neaylon said that when standing in the centre of this second main room, approximately 15% of the Pool could not be seen and elsewhere approximately 30% of the Pool could not be seen.⁷⁹ We also agree with those approximations as regards visibility of the Pool from the second of the two main habitable rooms of the Pool House.

67 Mr Neaylon agreed that the dividing wall which separated the two main habitable rooms was the main reason why 100% of the Pool and the surrounding pool area could not be seen when inside the Pool House.⁸⁰ The nib wall in the second room was another contributing factor with respect to reduced visibility of the Pool and the surrounding pool area from within the second main habitable room.

68 In contrast, when located in the open yard area behind the Dwelling, looking in an easterly direction towards the Pool, through the glass safety barrier which separates the Dwelling from the Pool Area, 100% of the Pool and the Spa and the surrounding pool area was visible from this location on the Land. There were no obstructions of note which interfered with the visibility of the Pool and the Spa when located in this area of the back garden.

The Notice

69 The Notice was issued on behalf of the Council by its duly authorised delegate⁸¹ Mr Neaylon. Mr Neaylon has been an employee of the Council for sixteen years and currently holds the position of Development Officer, Building. He is an Accredited professional - building level 2 under the Act.⁸² He has been a building surveyor for approximately 23 years.⁸³ During his employment at the Council, he also ran a business called *Adelaide Swimming Pool Inspections* where he offered swimming pool inspection services for landowners. He would inspect pool barriers and other safety features and advise a landowner of any areas of non-compliance under the Building Rules.⁸⁴

70 The Notice is set out as follows:

To: Ms Shirley Brixton (**You**)
30 Partridge Street
GLENELG SA 5045

⁷⁹ T15 lines 12-13.

⁸⁰ T15 lines 20-23.

⁸¹ This was not in dispute.

⁸² At the time of the hearing.

⁸³ Ibid.

⁸⁴ Exhibit R7, [1].

From: City of Holdfast Bay (the **Council**)
Brighton Civic Centre
24 Jetty Road
BRIGHTON SA 5048

WHEREAS:

1. You are the registered proprietor of the land comprised within Certificate of Title Register Book Volume 5667 Folio 694 known as 30 Partridge Street, Glenelg SA 5045 (the **Land**).
2. The Land is located in a General Neighbourhood Zone under the Planning and Design Code.
3. A pool house adjacent to a large outdoor swimming pool and spa is located on the Land (the **Pool House and Pool and Spa** respectively). The Pool House is a Class 1a building as that term is defined in the Building Rules under the *Planning, Development and Infrastructure Act 2016* (the Act).
4. The Pool House and Pool were constructed pursuant to the development approval in DA 110/480/14 (the **2014 Approval**). Building Rules consent for the 2014 Approval was granted by a private certifier. The 2014 Approval included a swimming pool safety barrier between the Pool House and the Pool which complied with the Building Rules in force at the time, particularly, in compliance with AS1926.1-2012 and AS1926.2-2007.
5. On 2 March 2023, development approval was issued to DA 23004601 under the Act for the Spa to be added to the outdoor pool area (the 2023 approval), adjacent to the Pool. Building consent for the 2023 approval was granted by a building certifier and not the Council. The 2023 approval comprised the construction of the Spa only and did not include any other variations to the 2014 approval.
6. Notification of the commencement of building work for the Spa was provided under the Act on 17 May 2023.
7. On 19 October 2023, Mr Richard Neaylon, an authorised officer of the Council and accredited professional – building level 2, undertook an inspection on the Land. Mr Neaylon observed that the Pool House had sliding doors opening directly into the safety zone of the Pool and Spa. Mr Neaylon formed the opinion that the lack of swimming pool safety barrier between the Pool House and the area surrounding the Pool and Spa constituted a breach of section 156(4) of the Act as well as being contrary to the 2014 approval and the 2023 approval.
8. Later that day, Mr Neaylon contacted the building certifier for DA 23004601 concerning the lack of a barrier. The building certifier then approved the removal of the barrier as a ‘minor’ variation under regulation 65 of the *Planning, Development and Infrastructure (General) Regulations 2017* and asserted that it complies with the Building Rules under the Act.
9. On 7 November 2023, Mr Neaylon issued an enforcement notice to You pursuant to section 213 of the Act.

10. On 16 November 2023, the enforcement notice was withdrawn on a without prejudice basis for the purposes of engaging with your legal representatives on this matter.
11. The Council remains of the view that the lack of a swimming pool safety barrier between the Pool House and the Pool is contrary to section 156(4) of the Act.
12. The Council is a designated authority under Part 18 Division 1 of the Act.
13. Section 213(1) of Act states:

213(1) If a designated authority has reason to believe on reasonable grounds that a person has breached this Act or the repealed Act, the designated authority may do such of the following as the designated authority considers necessary or appropriate in the circumstances:

- (a) direct a person to refrain, either for a specified period or until further notice, from the act, or course of action, that constitutes the breach;*
- (b) direct a person to make good any breach in a manner, and within a period, specified by the relevant authority;*
- (c) take such urgent action as required because of any situation resulting in the breach.*

14. The Council has reason to believe on reasonable grounds that You have breached section 156(4) of the Act as follows:

14.1 section 156(3)(a) of the Act provides that the regulations may require a designated owner of a swimming pool or building to ensure that designated safety features are installed and maintained in accordance with the prescribed requirements.

14.2 Regulation 6(1)(b) of the *Planning, Development and Infrastructure (Swimming Pool) Regulations 2019 (Swimming Pool Regulations)* provides that the Pool and Spa must have designated safety features which meet:

“the requirements relating to the construction and safety of swimming pools under the Building Code, as it applied at the time the application for a relevant consent or approval was made (being an application that related to the construction of the swimming pool or to some other form of building work where designated safety features are relevant).”

14.3 Regulation 6(1a) of the Swimming Pool Regulations provides that the requirements in regulation 6(1) are prescribed for the purposes of section 156(3)(a) of the Act and that the designated owner of a swimming pool must ensure that designated safety features are installed and maintained in accordance with the relevant requirements under regulation 6(1).

14.4 Section 156(1)(a) defines ‘designated owner’ to include You.

14.5 Section 156(4) provides that a person who contravenes, or fails to comply with, a requirement under this section (including a requirement prescribed by the regulations) is guilty of an offence.

- 14.6 You have breached section 156(4) of the Act in that you have failed to install and maintain the required swimming pool safety barrier between the Pool House and the Pool and Spa area. In particular:

the Pool and Spa area is accessible on the northern side by sliding glass doors located in the southern section of the Pool House;

the sliding doors within the Pool House do not comply with the Building Code as it applies to both the 2014 approval and the 2023 approval as a person can access the Pool and spa area without being required to pass through a child resistant gate and barrier as required by AS1926.1--2012 and AS1926.2--2007.

NOW TAKE NOTICE that you are directed to:

1. Install a compliant safety barrier required between the Pool House and the Pool and Spa area which complies with AS1926.1--2012 and AS1926.2--2007 **within two (2) months from the date of this notice.**

Dated 17 April 2024

Grounds of Appeal

71 The Appellant's originating appeal contained five grounds of appeal which were:

1. The Notice is defective, and ought to be quashed as the Respondent has not specified or particularised in the Notice which prescribed requirement under AS1926.1-2012 and AS1926.2-2007 it alleges the Appellant has not complied with such to amount to a contravention of Section 156(4) of the PDIA,⁸⁵ which specification or particularisation is necessary before the Council may validly impose a direction to the Appellant pursuant to Section 213.
2. The Notice is defective, and ought to be quashed as the Appellant has not breached the PDIA.
3. The Notice is defective and ought to be quashed as the Respondent is obliged to accept the building rules consent granted by PBS Building Certifiers as the relevant authority on 27 February 2023 (**the BRC**) which consent assessed the swimming pool safety barrier on the Land, relevantly including diagrams and a statement that the 'existing pool fence to be removed', as conforming with the Building Rules as defined under the PDIA.
4. The Notice is defective and ought to be quashed as the Appellant has complied with the development approval granted by the Respondent as the relevant authority on 3 March 2023 (DA 23004601) (**the Approval**) which approval affirmed the BRC.
5. The Notice ought to be quashed as it constitutes an impermissible collateral challenge to the BRC and the Approval.

⁸⁵ PDIA was defined in the appeal notice as *Planning, Development and Infrastructure Act 2016 (SA)*.

72 At the hearing, the appellant no longer pressed grounds 3 and 5.⁸⁶

The appellant's case

73 The appellant only pressed grounds 1, 2 and 4 at the hearing. She argued that the Notice should be quashed based on the grounds articulated in ground 2 alone. Otherwise, she submits that the Notice should be set aside on grounds 1 and 4.

Ground 2

74 The appellant contends that she has not breached the Act and therefore the Notice is invalid and should be quashed. She advances eight reasons in support of that contention.

75 First, she submits that her compliance with the Act and the SPS Regulations must be assessed by reference to the relevant Australian Standards, namely AS 1926.1 and AS 1926.2. The Act and the SPS Regulations require the designated safety features on the Land to comply with the relevant provisions of the Building Code in force at the time the applications for consent or approval were made. Performance requirement 2.7.1 of the Building Code will be satisfied with respect to a swimming pool associated with a Class 1 building, if it has safety barriers installed in accordance with the relevant Australian Standards, namely AS 1926.1 and AS 1926.2, which is a *deemed to satisfy* provision of the Building Code. The appellant therefore contends that if the safety barrier that is present on the Land complies with the Australian Standards, it will comply with the Building Code and therefore also the Act and SPS Regulations.

76 Secondly, the appellant submits that the safety barrier in place on the Land which separates the Pool Area from the Dwelling, complies with, and is in accordance with, the relevant Australian Standards. She contends that the required designated safety features have been installed and are being maintained in accordance with the prescribed requirements and nothing further is required.

77 Thirdly, and related to the previous reason, the appellant submits that the Pool House is a free-standing building within the Pool Area and is inaccessible *other than* through the child resistant gate within the existing safety barrier. The external walls of the Pool House constitute part of the barrier restricting access to the Pool and the Spa as these external walls do not contain any openings (e.g., doors or windows). The remainder of the barrier is the glass pool fence which extends from the southeastern corner of the Pool House, around the pool paving to the southwestern corner of the Pool House. Anyone who wishes to access the Pool Area, including the Pool House, and indeed the Pool and the Spa, can only do so by *first* passing through the child resistant gate which forms part of the existing barrier.⁸⁷

⁸⁶ Appellant, Written submissions of appellant, dated 16 August 2024, [5].

⁸⁷ Appellant, Written submissions of appellant, dated 16 August 2024, [8].

78 Fourthly, the appellant submits that none of the four diagrams shown in Figure 2.1 in AS 1926.2-2007 (shown above)⁸⁸ apply to the situation that exists on the Land. She said that it does not follow that the existing barrier in place on the Land does not comply with AS 1926.2-2007. Each of these diagrams includes a pool, a barrier and a building. In diagrams (a) and (b), the pool is surrounded by a barrier and is physically separated and isolated from the adjacent building shown in the diagram. That is not the case on the Land because there is no barrier separating or isolating the building (i.e., the Pool House) from the Pool and the Spa.

79 The appellant says that there is some superficial similarity with the situation on the Land as depicted in diagrams (c) and (d) in Figure 2.1. This is because the building shown in each of these two diagrams is not physically separated from the pool by way of an isolating fence or barrier. That is the case on the Land at present given the Pool House is not physically separated or isolated from the Pool and Spa by a fence or a barrier. In diagram (c) however there is no access at all *from the building* to the pool and the surrounding pool area. That is not the case at present on the Land either because direct access to the Pool and the Spa can be gained from the Pool House. In diagram (d) there is a child resistant openable portion of a window in the wall of the building but, once again, there is no access at all *from the building* to the pool and the surrounding pool area in diagram (d). That is not the case at present on the Land as direct access to the Pool and the Spa can be obtained from the Pool House.

80 The appellant submits that the difference between the existing situation on the Land and what is depicted in diagrams (c) and (d) is that the building shown in each of these two diagrams can be accessed from *outside* the pool area. She submits that neither diagram (c) nor (d) are relevant to the facts of this case because presently there is no access provided to the Pool House from *outside* the existing safety barrier. The distinction being that there is no way a person can access the Pool House on the Land without *first* going through the child resistant safety gate located within the pool fence which forms part of the barrier. In diagrams (c) and (d), a person could enter the building depicted therein without *first* going through a child resistant safety gate. In diagrams (c) and (d), once a person has gained access to the building, there is no way to *then* access the pool from the building. The appellant accepted that if there was a door which led to the Pool House at the Land which was accessible from *outside* the safety barrier (as is the case in diagrams (c) and (d)), that that scenario would not comply with AS 1926.2-2007. That is because, in that situation, the Pool House could be entered without first going through a barrier, and once inside the Pool House there would be no barrier between the Pool House and the Pool and Spa.⁸⁹

⁸⁸ See paragraph 51.

⁸⁹ T93 lines 23-33.

81 Fifthly, the appellant submits that the situation at the Land is not a ‘typical example’ of a barrier location for the purposes of clause 4.2 of AS 1926.2-2007. She argues that this does not mean the barrier on the Land is contrary to AS 1926.2-2007. She argues that consideration must be given to whether the remaining text of clause 4.2 is satisfied by the barrier arrangement that has been installed on the Land, regardless of the diagrams show in (a) – (d).⁹⁰ She argues that there are only three requirements of clause 4.2, namely:

1. that a child resistant door set cannot be installed in a barrier for an outdoor pool;
2. that the openable portion of any window in a barrier must comply with AS 1926.1; and
3. that a balustrade on a balcony projecting into any non-climbable zone must comply with AS 1926.1.

82 In relation to each of these three requirements, the appellant submits that none are offended in this case. There is no child-resistant door set in the barrier that separates the Pool Area from the Dwelling. There is no openable window in this barrier either. There is no balcony involved in the circumstances of this case. The appellant argues that the fact that the barrier in place is not depicted in any of the four diagrams in Figure 2.1 in clause 4.2 of AS 1926.2-2007 “*is of little moment*”.⁹¹ She says that the four diagrams are said to be “*typical examples of compliant barrier locations*”.⁹² The Standard cannot be said to preclude other forms of compliant barriers. She submits “*in a case which does not fit into any of the diagrams in Figure 2.1, the question is whether the proposed barrier meets the intent of clause 4.2 as expressed by the language used in that clause*”.⁹³

83 Sixthly, the appellant places considerable weight on the information contained in the preface to AS 1926.2-2007 which, for convenience, is set out once more below:

The objective of this Standard is to assist pool users/owners in avoiding pool-related drowning by providing options for the location of pool barriers, which are designed to deny, delay or detect unsupervised entry to the swimming pool area by young children.⁹⁴

(Our emphasis).

84 As previously identified, the term “pool area” is defined in the Standards to be the area that contains the pool and is enclosed by a barrier. The appellant says that a barrier is in place which prohibits entry to the Pool Area on the Land and so the objective of the Standard is therefore met. She contends that the Land within

⁹⁰ Appellant, Written submissions of appellant, dated 16 August 2024, [57].

⁹¹ Appellant, Written submissions of appellant, dated 16 August 2024, [81].

⁹² Ibid.

⁹³ Ibid.

⁹⁴ Exhibit R1 at [101].

the existing barrier is the “pool area” for the purpose of AS 1926.2-2007.⁹⁵ At present, access cannot be gained to the swimming *pool area*, (as that term is defined in the Standards), other than through the child resistant barrier that is in place.

85 Seventhly she contends that although Appendix B does not encourage buildings to be located within a pool area, it does not strictly prohibit it either. She submits that there is nothing in the Standards which prohibits the Pool House being located *within* the Pool Area. We note however that the buildings and structures referred to in Appendix B of AS 1926.2-2007 are all Class 10 buildings, i.e., tool sheds, garages etc. None of the types of buildings mentioned in Appendix B are Class 1 buildings. We will return to the significance of this in due course.

86 Eighthly, although the 2016 version of the Building Code is not directly relevant to the appeal, in that version of the Building Code, a special provision applied to swimming pool access in South Australia when a habitable room or a building with a habitable room (a Class 1a building) was located *within* a pool area. In that scenario, the 2016 version of the Building Code *required* a compliant safety barrier to be in place between the habitable room or habitable building and the pool itself. This requirement was not in the 2014 version of the Building Code (under which the 2014 Development was assessed). The provision was deleted or removed from the 2019 version (under which the 2023 Development was assessed). The appellant contends that the insertion of this provision and its subsequent deletion supports her submission that a barrier is not required to be installed between a habitable room (or a Class 1a building) that is located within a pool area, and the pool itself.⁹⁶ There was no explanation proffered by either party as to why this provision was inserted and then subsequently deleted from the Building Code.⁹⁷

87 The appellant submits that given (on her case) the barrier on the Land complies with clause 4.2 of AS 1926.2-2007, that the Pool and the Spa have designated safety features in place which comply with the relevant provisions of the Building Code in force at the time the applications were made. She argues therefore that it cannot be the case that she is in breach of r 6(1)(b) of the SPS Regulations and s 156 of the Act. She says that the Notice is defective, and ought to be quashed on this basis alone.

Ground 1

88 The appellant argued that the Notice is invalid because it does not sufficiently particularise which requirements of the relevant Australian Standards are not satisfied in this case. She argues that the terms of the Notice do not draw any distinction between AS 1926.1-2012 and AS 1926.2-2007. Further, she submits

⁹⁵ Appellant, Written submissions of appellant, dated 16 August 2024, [73]-[74].

⁹⁶ Appellant, Written submissions of appellant, dated 16 August 2024, [37].

⁹⁷ T55 lines 6-9.

that the Notice fails to identify which provision of the Building Code the Council relies on when alleging a breach of s 156 of the Act. These deficiencies were made apparent following the Council filing its amending response to the originating appeal⁹⁸ when, for the first time, she submits, it provided material particulars relied upon by the Council for the purpose of asserting a breach of the Act. The appellant relies on *Sullivan v District Council of Riverton*⁹⁹ and submits that an enforcement notice under the planning legislation must be clear and unambiguous in its terms, and a notice which does not achieve this is not a proper notice under the Act.¹⁰⁰ She argues the Notice should be set aside on this additional or alternative basis.

Ground 4

⁸⁹ The appellant has complied with a development approval granted by the Council on 3 March 2023 with respect to the 2023 Development. She submits that the approval *affirmed* the building consent granted by PBS. She argues that the Council cannot issue a development approval on the basis that it complies with the Building Code and subsequently take enforcement action alleging that the development does not comply with the Building Code, absent a judicial determination as to invalidity.¹⁰¹ The appellant relies upon the decision of the Supreme Court of the Australia Capital Territory in *Capital Recycling Solutions Pty Ltd v Planning and Land Authority of the Australian Capital Territory (Capital Recycling Solutions)*.¹⁰² In *Capital Recycling Solutions*, the Planning and Land Authority of the ACT granted approval to a development application (the first decision) and subsequently voluntarily reviewed this decision, resulting in a second decision which purported to change the first decision by refusing the development application. The plaintiff successfully sought declaratory relief that the second decision of the Authority was void *ab initio* on the basis that it had no jurisdiction to make it. McWilliams AsJ stated:

There is a line of authority to the effect that invalidity is required to be established by a judicial rather than an administrative determination, and any decision tainted by jurisdictional error is valid and effective in law until such a determination is made. Examples are to be found in: *Forbes v New South Wales Trotting Club Ltd* (1979) 143 CLR 242 per Aikin J at 277; *Ousley v The Queen* (1997) 192 CLR 69 (*Ousley*) per Gummow J at 130-131; and *R v Balfour; ex parte Parkes Rural Distributions Pty Ltd* (1987) 17 FCR 26 at 33.

If the position were otherwise, the operation of the vast number of administrative decisions made daily would be compromised, and the system would be unworkable. Indeed, to paraphrase the legal philosopher Hans Kelsen, the system would be reduced to a ‘state of anarchy’: see *State of New South Wales v Kable* [2013] HCA 26; 252 CLR 118 per Gageler J at [40] quoting Hans Kelsen.

That statement has particular force in a planning context. As raised with the parties during the hearing, no one would be in a position to build or develop with any

⁹⁸ Respondent, Amended response to originating appeal notice by respondent (undated).

⁹⁹ (1997) 69 SASR 234.

¹⁰⁰ (1997) 69 SAS 234, at [246]

¹⁰¹ Appellant, Written submissions of appellant, dated 16 August 2024, [98].

¹⁰² [2019] ACTSC 58.

certainty in the Territory if a development approval granted on one day were able to be unilaterally treated as void and of no effect by the Authority the next day.

The proposition that invalidity is to be established by judicial determination in a planning context is consistent with what has been well-established elsewhere: see, for example, *F Hannan Pty Ltd v Electricity Commission of New South Wales [No 3]*, (1985) 66 LGRA 306 (*Hannan*) per McHugh JA at 327; and, *GPT Re Ltd v Belmorgan Property Development Pty Ltd* (2008) 72 NSWLR 647 (*GPT Re Ltd*) per Basten JA at [90].¹⁰³

90 The above observations of the court in *Capital Recycling Solutions* have been held to apply to all planning systems in Australia.¹⁰⁴

91 The appellant submits that the Court ought to quash the Notice based on the Council's failure to take issue with the barrier at the time of the grant of the development approval in 2023. The appellant spent her time and money in implementing the approval which she says she was entitled to rely upon.¹⁰⁵

92 She argues that if the Council had concerns about the approval, these matters ought to have been raised and dealt with by the Council before it allowed her to undertake the development in accordance with the approval which it had granted.¹⁰⁶ She submits that until such time as the development approval is quashed or determined to be invalid, she is entitled to rely upon it and that the Council wasn't permitted to issue the enforcement notice on that basis.¹⁰⁷

The Council's case in response

Ground 2

93 The Council made six points in response to the submissions made by the appellant.

94 First, the Council contends that the appellant's approach to the interpretation of the Australian Standards is wrong and argues that the Australian Standards must be considered in context and read as a whole. It is contrary to the established principles of statutory interpretation¹⁰⁸ that the appellant need only satisfy the requirements of the three criterion within the text of clause 4.2 of AS 1926.2-2007 with respect to the location of the barrier on the Land and to otherwise disregard the other provisions of the Standard, including the preface which sets out the *objectives* of the Standards, together with the *diagrams* depicted in Figure 2.1 and the *guidance notes* provided in Appendix B.

¹⁰³ [2019] ACTSC 58, [20] – [23].

¹⁰⁴ *Charara v Ku-ring-gai Council* [2019] NSWLEC 183, at [36].

¹⁰⁵ Appellant, Written submissions of the appellant, dated 16 August 2024, [101].

¹⁰⁶ T108 lines 29-32.

¹⁰⁷ T63 lines 7-10.

¹⁰⁸ *Project Blue Sky Inc and Others v Australian Broadcasting Authority* (1998) 194 CLR 355.

95 Secondly, the Council argued that the appellant has adopted a narrow, selective and literal reading of the Standards. When read in context and as a whole it was argued that it is clear that direct access to an outdoor pool from a Class 1 building is prohibited¹⁰⁹ and all four of the diagrams shown in Figure 2.1 of AS 1926.2-2007 support that contention.

96 Thirdly, the glass sliding doors of the Pool House do not comply with AS 1926.2 in any event. Up until 2011, it was permissible for a child resistant door set to be included within a barrier for an outdoor pool. A child resistant door set is defined in AS 1926.2-2007 as “a door set that comprises a door, door frame, self-closing device and self-latching device, that is designed to provide an access way from the building to an outdoor pool”. Clause 4.2 of AS 1926.2-2007 provides that a child resistant door set can no longer be installed in or form part of a barrier for an outdoor pool.¹¹⁰ That was the case when the applications were made for both the 2014 Development and the 2023 Development. The glass sliding doors in the Pool House which now provide direct access to the Pool and the Spa are not child-resistant in that they do not contain a self-closing or self-latching device. The Council therefore submits that the fact that a child resistant door set is no longer permitted in a barrier for an outdoor pool supports the Council’s case that direct access to the Pool and the Spa, through the glass sliding doors of the Pool House, is contrary to the Australian Standards.¹¹¹

97 Fourthly, the Council asserts that the southern wall of the Pool House forms part of the safety barrier to the Pool and the Spa.¹¹² Given the glass doors are located within that barrier, it is non-compliant¹¹³ (even if they were child resistant). The Council submits that the barrier does not comply with the guidance notes set out in Appendix B either. Appendix B provides that constant adult supervision is essential whenever a young child is within the pool area. The dividing wall within the Pool House impairs the supervision of a child that is located within the Pool and/or the surrounding pool area.¹¹⁴ Mr Neaylon gave evidence to that effect. He also gave evidence about what he considered Appendix B was seeking to achieve. He said that it sought to ensure that a person supervising a child would have clear and unobstructed vision of the *entire* pool. He said that in its present form, there were sections of the Pool and the surrounding pool area which were not clearly visible from certain vantage points within the two main habitable rooms of the Pool House. As a result, he opined that Appendix B was not satisfied.¹¹⁵

98 Fifthly, the Council submits that the Court should reject the appellant’s submission that the insertion and subsequent deletion of a specific provision in the

¹⁰⁹ Respondent, Outline of submissions, dated 16 August 2024, [50] and T56 lines 17-20.

¹¹⁰ Exhibit R1 at [104].

¹¹¹ Respondent, Outline of submissions, dated 16 August 2024, [38]-[40].

¹¹² *Ibid*, [48].

¹¹³ *Ibid*.

¹¹⁴ *Ibid*, [51]-[53].

¹¹⁵ T16 lines 5-30.

2016 version of the Building Code which applied in South Australia¹¹⁶ supported a finding that a barrier was no longer required between the Pool House and the Pool and Spa. The Council acknowledged that such a provision once existed in the 2016 version of the BCA, but that when each of the four diagrams depicted in Figure 2.1 of AS 1926.2-2007 are considered, that such a provision was now unnecessary and superfluous. Mr Neaylon agreed.¹¹⁷ The Council contended that in so far as the building shown in each of these diagrams in Figure 2.1 represented a habitable building or a building containing habitable rooms, there was in fact no direct access to the pool provided in *any* of the four examples shown. It was submitted:

I just wanted to address the issue of that SA variation which was not in the 2014, [was included] in the 2016 version and then removed in the 2019 version. Mr Neaylon's evidence was to the effect that he didn't know why it was put in and taken out and I think it's fair to say that nobody does, we've searched for an explanatory memorandum or any other document to try to understand it and can't find anything. But it was his evidence that it was superfluous, that it was unnecessary because the current standard as we have it for the location of barriers for outdoor pools covered what was included by that SA variation in 2016. In my submission that's the likely reason as to why it was taken out, because it was unnecessary. What my learned friend tries to suggest is the opposite, it was taken out because it's now permitted and I would say well when read in context of the objective of the legislation and everything else that, that can't be the explanation.¹¹⁸

99 The respondent argued that the existing situation on the Land does not comply with the Australian Standards given there is no barrier between the Pool House and the Pool and the Spa on the Land. Therefore, the designated safety features with respect to the Pool and the Spa are not in accordance with the requirements relating to the construction and safety of swimming pools under the Building Code as it applied at the time the application was made for the 2023 Development. The consequence of this is that the appellant has breached and is currently in breach of the requirements of r 6(1)(b) of the SPS Regulations and s 156 (4) of the Act.

Ground 1

100 The Council agrees that an enforcement notice issued under the Act must be clear and unambiguous in its terms and that it must specify with reasonable particularity the alleged breaches and the directions which must be complied with. The Council submits that the Notice identifies that the alleged breach of the Act is a breach of s 156(4). The Notice particularises that the breach includes a failure to comply with the *Australian Standards*, namely AS 1926.1-2012 and AS 1926.2-2007, by its reference to the removal of the barrier previously approved in 2014 (clauses 4 and 8 of the Notice). The Notice identifies that a lack of a safety barrier

¹¹⁶ Which provisions required a barrier to be in place between a pool and a habitable room or a building containing an habitable room within a pool area.

¹¹⁷ T34 lines 30-38 and T35 lines 1-21.

¹¹⁸ T55 lines 1-20.

between the Pool House and the Pool and Spa is contrary to the Act (clause 11 of the Notice).

101 The Council rejects the proposition that it ought to have provided a “*level of granularity in the detail of the alleged breach*”.¹¹⁹ Further, it argues that the Notice makes clear what measures are required to be taken and that there could be no doubt that reinstatement of the barrier approved in the 2014 Development or an alternative compliant barrier would achieve compliance with the Act. In any event, it was submitted that it would be inappropriate for the Council to direct *precisely* where a compliant safety barrier ought to be installed on the Land given there are multiple options available to the appellant.¹²⁰ The only other way in which the Notice could perhaps have been even clearer, if that was necessary, would have been for it to have recited the entirety of the relevant *Australian Standards*. Consistent with the Council’s case, it is not just clause 4.2 of AS1926.2-2007 which must be considered, rather it is the whole of the Standards which apply.¹²¹ The Council submits that this level of detail was not necessary with respect to the Notice.

102 Finally, the Council argued that there was a significant amount of correspondence between the parties prior to the Notice being issued, and the Notice was able to be readily understood by the appellant given that background and context.¹²² Mr Neaylon gave evidence about what transpired prior to the Notice being issued to Ms Brixton¹²³ and that it should not be accepted that the Notice came out of the blue.¹²⁴

Ground 4

103 In response to this ground of appeal, the Council made three alternative contentions. First, it submitted, relying on the decision of this Court in *Cairo v The Corporation of the City of Norwood Payneham & St Peters & Anor (Cairo)*¹²⁵ that it was *required* to accept the building consent granted by PBS to the 2023 Development.¹²⁶ Therefore, the Council submitted the issuing of the Notice did not constitute a revisiting of an earlier decision, namely the Development Approval. Secondly, it submitted that irrespective of any development approval or authorisation, the appellant was obliged to comply with the requirements imposed by s 156 of the Act and the SPS Regulations.

104 Thirdly, the Council argued that the Court could consider and determine a collateral challenge against the decision by PBS to grant a building consent to the 2023 Development as it is the subject of jurisdictional error and a nullity because

¹¹⁹ Respondent, Outline of submissions, dated 16 August 2024, [59].

¹²⁰ *Ibid*, [61].

¹²¹ T75 lines 21-28.

¹²² *Ibid*, [63].

¹²³ T26-T29.

¹²⁴ *Amberich Pty Ltd v The City of Mount Gambier* [2013] SAERDC 12.

¹²⁵ [2018] SAERDC 11, [24]-[37].

¹²⁶ Respondent, Outline of submissions, dated 16 August 2024, [78].

it is so illogical or irrational that no rational decision maker could have formed the opinion that no barrier was required between the Pool House and the Pool and the Spa.¹²⁷ The Council contends that it can pursue a collateral challenge in these proceedings against the decision to grant building consent to the 2023 Development in circumstances where, first, the Court is properly seized of a justiciable controversy regarding the consent by virtue of a number of the appellant's grounds of appeal¹²⁸ (at the hearing this was limited to ground 4 of the appeal only). Secondly, consistent with the decision of the Supreme Court in *Jacobs v Onesteel Manufacturing Pty Ltd v Workcover Corporation of SA (Jacobs)*,¹²⁹ where a collateral challenge was permitted, the grounds of challenge in this case do not involve the adducing of substantial evidence and that the proper parties are before the Court.¹³⁰ Thirdly, it was argued that there is no statutory provision that indicates or suggests that a collateral challenge ought not be permitted in this instance.¹³¹ The Council submits that a successful collateral challenge to the building consent would not render the approval granted to the 2023 Development a nullity, rather it would mean that ground 4 of the appeal could not succeed.¹³² It was submitted that the decision of the certifier to grant a building consent to the 2023 Development lacked an evident and intelligible justification in circumstances where:

1. the configuration for safety barriers enclosing the swimming pool area in the 2014 Development was designed in compliance with AS 1926.2-2007;
2. removal of a portion of the safety barrier on the western side of the swimming pool (which was the subject of the 2014 Development) and repositioning of the western barrier such that direct access could be obtained from the Pool House to the Pool resulted in non-compliance with AS 1926.2-2007;
3. the mandatory terms of AS 1926.2-2007 applying to outdoor pools are clear and readily interpreted on their face; and
4. the building consent granted to the 2023 Development did not contain a properly documented performance solution in accordance with the requirements of the NCC (Part A2.2(4)) and is not in accordance with s 102(1)(b) of the Act.¹³³

¹²⁷ Ibid, [79].

¹²⁸ Ibid, [84.1].

¹²⁹ [2006] SASC 32, [93].

¹³⁰ Respondent, Outline of submissions, dated 16 August 2024, [84.2].

¹³¹ Ibid at [84.3].

¹³² Ibid at [86].

¹³³ Ibid at [90].

Determination

Ground 2

105 Under Ground 2, the appellant asserts that she has complied with the Act. To succeed on the appeal ground, she must establish that:

1. she has complied with the requirements imposed under Part 2.7.1 of the Building Code (without resort to AS 1926.1-2012 and AS 1926.2-2007); or
2. she has complied with the requirements imposed by AS 1926.1-2012 and 1926.2-2007 and therefore has complied with the requirements imposed under Part 2.7.1 of the Building Code.

Approach to interpretation of the provisions of the NCC

106 The structure of the Act and the SPS Regulations is that compliance with those legislative instruments is determined by the content of the Building Code. Section 156 of the Act refers to designated safety features which is defined in s 3(1) as being swimming pool safety features. That term is defined as a fence, barrier or other structure or equipment prescribed by the regulations.¹³⁴ The SPS Regulations specifically refer to the provisions of the Building Code in prescribing the designated safety features that apply under the Act in relation to swimming pools that are approved, constructed or installed *after* 1 July 1993.¹³⁵ The Building Code is a legislative instrument as defined in s 4 of the *Legislation Interpretation Act 2021* (SA) on the basis that it may be considered to be “*any [other] instrument of a legislative character made or in force under [the] Act*”.¹³⁶

107 In *Garden College v City of Salisbury*¹³⁷ this Court set out the approach to statutory interpretation when considering the provisions of a statutory instrument made under the Act, which, in that case, concerned the Planning & Design Code. We respectfully adopt the Court’s summary of the principles in that case¹³⁸ and consider that they have equal application regarding this matter with respect to the interpretation of the provisions of the Building Code, also a statutory instrument in force under the Act. The Court must have regard to the text, context and statutory purpose of the relevant provisions when interpreting the provisions of the Building Code.¹³⁹ It was only those provisions of Volume Two of the Building Code dealing with swimming pool safety specifically which were included in the respondent’s tender book. Volume Two of the Building Code is almost six hundred pages long. While the entire document was not tendered by either party, in order for the Court to have proper regard to the text, context and statutory purpose of the most

¹³⁴ *Planning, Development and Infrastructure Act 2016* (SA), s 3(1)

¹³⁵ The Building Code is defined in s 3 of the Act to mean an edition of the *Building Code of Australia* published by the Australian Building Codes Board in the National Construction Code series. Section 79 of the Act provides that the Building Code, as in force from time to time, applies for the purposes of the Act, subject to certain qualifications.

¹³⁶ *Legislation Interpretation Act 2021* (SA), s 4.

¹³⁷ *Garden College v City of Salisbury* [2022] SAERDC 10.

¹³⁸ [2022] SAERDC 10, [22]-[35].

¹³⁹ [2022] SAERDC 10, [63].

pertinent provisions of the Building Code it was necessary for other provisions of the Building Code to be considered and referred to. On hearing any proceedings, s 21(1)(b) of the *Environment Resources & Development Court Act 1993* (SA) enables this Court to inform itself as it sees fit.

Compliance with the requirements under the Building Code

108 The performance requirements under the Building Code which apply, namely P 2.7.1, outline the *minimum* necessary standards with respect to the barrier that must be satisfied in this case.¹⁴⁰ The substance of the appellant's case is that there is an existing barrier on the Land which satisfies the provisions of the Australian Standards, a deemed to satisfy solution under the Building Code (Part 3.10.1.0). We acknowledge that performance requirement P2.7.1 will be satisfied if the deemed to satisfy provision is met. However, we consider that the correct approach in determining whether r 6(1)(b) of the SPS Regulations has been complied with, is to *first* consider the relevant provisions of the Building Code (P2.7.1 together with Part 3.10.1.0) *before* considering and applying the provisions of the Australian Standards. To approach the assessment the other way around, which appears to be what the appellant has done, namely that the provisions of the Australian Standards are considered and applied *first* before considering the provisions of the Building Code, is, to use a colloquialism, to put the cart before the horse.

109 It is convenient to outline once again the applicable Building Code provisions. When considering these provisions, it is necessary to keep in mind their objective which is to safeguard young children from drowning or injury in a swimming pool (O2.7):

Performance Requirements

P2.7.1 Swimming pool access

A barrier must be provided to a *swimming pool* and must –

- (a) be continuous for the full extent of the hazard; and
- (b) be of a strength and rigidity to withstand the foreseeable impact of people; and
- (c) restrict access of young children to the pool and the immediate pool surrounds; and
- (d) have any gates and doors fitted with latching devices not readily operated by young children, and constructed to automatically close and latch.

...

¹⁴⁰ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A2 Compliance with the NCC, A2.4, A combination of solutions (Explanatory Information) at [17].

Acceptable Construction Manuals

3.10.1.0

- (a) *Performance Requirement 2.7.1* is satisfied for a *swimming pool* with a depth of water more than 300mm and which is associated with a Class 1 building, if it has safety barriers installed in accordance with AS 1926.1 and AS 1926.2

...

(Our emphasis)

Three issues arise from these provisions.

They are:

- (1) what is the hazard for the purpose of P2.7.1(a)?
- (2) what does the *immediate pool surrounds* mean for the purpose of P2.7.1(c)?
- (3) what does *associated with a Class 1 building* mean for the purpose of 3.10.1.0?

What is the hazard (P2.7.1(a))?

110 P2.7.1(a) states that a barrier provided to a swimming pool must be continuous for the full extent of *the hazard*. The hazard must be taken to be a reference to the swimming pool itself, in this scenario that is the Pool and the Spa. They are the only hazards which could result in a young child drowning which is referred to in the relevant objective (O2.7).¹⁴¹ It is therefore a requirement of the Building Code that any barrier must be continuous for the full extent of the Pool and the Spa on the Land.

What are the *immediate pool surrounds* (P2.7.1(c))?

111 P2.7.1(c) provides that the barrier must not only restrict access of young children to the pool but, in addition, the barrier must also restrict access to the *immediate pool surrounds*. P2.7.1(c) could have only required a barrier to be installed so as to restrict access to the pool itself. However, it is an *additional* requirement that the barrier must also restrict access to the *immediate pool surrounds*. These mandatory technical provisions deliberately include this additional requirement with respect to a barrier. It is therefore necessary to consider what is meant by the phrase the *immediate pool surrounds* in P2.7.1(c).

112 The NCC does not provide a definition for this phrase, nor any guidance as to how the phrase ought to be interpreted. It does not define the boundaries or limitations of or the specific features of what the *immediate pool surrounds* of a swimming pool may be or might include. As the NCC itself identifies within the governing requirements, where a word is not defined in the NCC, the common

¹⁴¹ NCC 2019 Volume Two, Amendment 1, Section 2 Performance Provisions at [71].

meaning of the word should be used.¹⁴² That is consistent with the rules of statutory interpretation in any event where a term is not defined in the relevant instrument and it is the correct approach in interpreting the provisions of the Building Code.

113 The term “*surrounds*” is not a defined term in the Macquarie dictionary. The term “*surround*” is defined as:

1. to enclose on all sides, or encompass.
2. to form an enclosure round; encircle.
3. ...
4. a border which surrounds, as of uncovered floor around a carpet.¹⁴³
- ...

(Our emphasis).

114 We consider that the *pool surrounds* of a swimming pool will include the paving, decking or walkway areas around the pool itself, the landscaped areas such as gardens and the like, and possibly any buildings or structures which *border*, or *surround* or are *adjacent to* a swimming pool. We determine that in this case, the area of land that surrounds the Pool and the Spa which is currently enclosed by the existing barrier located on the Land constitutes the *pool surrounds*. What constitutes the immediate pool surrounds requires further consideration.

115 The term “*immediate*” is defined as “*having no object or space intervening; nearest or next: in the immediate vicinity*”.¹⁴⁴ The inclusion of the word *immediate* before the words *pool surrounds* in P2.7.1(c) is instructive. It indicates that if there are other *objects* such as, for example, other buildings or structures, or if there are *spaces* within the pool surrounds which are not *in close proximity to* or in the *immediate vicinity of* the pool itself, that these objects or spaces could not be considered to be located within the *immediate* pool surrounds. Such objects or spaces would be located outside the *immediate* pool surrounds.

116 There is no explanatory information or similar provided in the Building Code which explains why the word *immediate* was included before the words *pool surrounds* in P2.7.1(c). The inclusion of this term must serve a purpose. It is a limiting term. We consider that this purpose is to reduce in size the area of land surrounding a swimming pool that is required to be enclosed by a barrier. In effect, it seeks to reduce in size the area which would be required to be under supervision or surveillance should a young child be located either within the pool or the areas in the immediate vicinity of the pool, i.e., the paving and decking areas which

¹⁴² NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation, *Explanatory Information*, at [15].

¹⁴³ *Macquarie Dictionary* (online at 29 January 2025) ‘surround’, (def 1, 2 and 4).

¹⁴⁴ *Macquarie Dictionary* (online at 29 January 2025) ‘immediate’ (def 4).

immediately surround the pool itself. That has the consequence that it limits the risk to young children to an area where the child can be under supervision or surveillance. Too large an area would reduce the effectiveness and ability of supervision or surveillance of a young child.

117 That finding is *supported* by the informative provisions in Appendix B which provides:

The distance of the barrier from the pool should take into consideration a safety margin sufficient to discourage diving and jumping from the barrier into the pool. The barrier should be located to enable adult supervision from within the pool area. Whenever a young child is inside a pool area, constant supervision is essential.¹⁴⁵

118 While we accept this is an informative provision (for information and guidance purposes only), it emphasises that a barrier ought to be in close proximity to the pool, subject only to ensuring the distance is far enough away so as to ensure that a person cannot dive or jump into the pool from the barrier itself.

119 Furthermore, we have determined that when considering what may constitute the *immediate* pool surrounds, it is the area of land that would be intended for activities *directly related* to the swimming pool itself, such as swimming, or poolside seating, sunbathing and the like. This would generally only include the paving and decking areas and lawn in close proximity to or in the immediate vicinity of the pool itself. Any area beyond this would not be located within the *immediate pool surrounds*. It is consistent with the objective of the performance requirements which are to safeguard against young children drowning that a child cannot enter through a barrier on the land, which on the face of it prevents access to a swimming pool, with the child then being able to wander off for perhaps ten, twenty or thirty metres towards the pool. The child may be able to wander some distance away from the barrier through which they have passed. The child may no longer be visible (i.e., there could be vegetation or structures in place between the barrier and the pool which could reduce or obscure visibility) with the child no longer being able to be adequately supervised.

120 In considering what the *immediate* pool surrounds may be, the proximity of the pool to the relevant object or space in question is clearly an important factor, but so too is the *use* to which the objects or spaces within the pool surrounds may be put. With respect to a Class 1a building located within the pool surrounds of a swimming pool, such as, for example; a sleepout, a granny flat, ancillary accommodation, a pool house, these buildings, and the use to which they are put, cannot be said to be *directly related* to the pool itself. This is because such buildings contain habitable rooms, including rooms that may be used for *normal domestic activities*, such as bedrooms, living rooms, lounge rooms, music rooms, television rooms, kitchens, dining rooms, home theatres and the like. These are

¹⁴⁵ Exhibit R1 at [108].

habitable rooms which have no connection to the activities which may take place in and around the pool itself.

121 In contrast, a pool shed housing the infrastructure for a swimming pool, for example a pool pump (being a Class 10 non-habitable building under the Building Code) is a building or structure that is directly related to the swimming pool itself. It would ordinarily be located in close proximity to a swimming pool also. Such a building would likely be included within the *immediate pool surrounds* given its usual proximity to the pool but also due to the purpose for which the building exists, namely, to house the infrastructure which enables the pool to be used.¹⁴⁶ The difference between a habitable building and a non-habitable building essentially turns on the purpose for which the building is used, the frequency of use and the period of time spent within such buildings. A Class 10 building, being a non-habitable building, would serve a specific function, would be infrequently used and accessed only for short periods of time (i.e., in the example given, to turn the pool pump on/off or to check the infrastructure, etc). This would mean that the non-habitable building would generally not create distractions or become an impediment to the provision of adequate supervision to young children that may be within the pool or the immediate pool surrounds.

122 A building, such as the Pool House, being a Class 1a building, having a floor area of 125m², containing habitable rooms which may be used for the many different kinds of normal domestic activities in the manner described above, cannot be considered to be located within the *immediate pool surrounds*. If we are wrong in placing any reliance or weight on the *use* to which the building in question may be put, we have determined that, in any event, the windows and the glass sliding doors within the southern elevation of the Pool House are themselves *objects* which intervene or intrude upon the pool surrounds such that they cannot be said to be located in the *immediate pool surrounds*. Any area beyond or behind those windows and the glass sliding doors, i.e., the rooms themselves within the Pool House, cannot therefore be considered to be within the *immediate pool surrounds*. The whole of the Pool House is not within the immediate pool surrounds even if the only criteria that were applied was one of proximity to the pool.

Compliance with P2.7.1 of the Code

123 P.2.7.1 does not express between what objects the barrier must be erected. P.2.7.1 could never be so specific as the objects or buildings or areas beyond the pool and the immediate pool surrounds will be of great variety. Therefore, where the barrier must be is between the pool and the immediate pool surrounds, and any area or object beyond that. While the barrier on the Land may restrict access to the Pool and the Spa from the Dwelling on the Land, it does not restrict access of young children to the *immediate pool surrounds* from the Pool House. There is unimpeded access to the Pool and the Spa from the Pool House, which building

¹⁴⁶ For example, through enabling the circulation of water in the pool, removing dirt and debris through the filtration of the water in the pool and for distributing chemicals into the pool, etc.

we do not consider to be located within the *immediate* pool surrounds in the context of this site.

124 Mr Neaylon was asked what he considered to be the *immediate pool surrounds* on the Land. In his view, the Pool House together with the glass fencing which surrounded the Pool Area constituted the *immediate pool surrounds*.¹⁴⁷ He did not provide any persuasive reason as to why he came to this conclusion. We disagree with Mr Neaylon's summary of what would constitute the *immediate* pool surrounds in the circumstances of this particular case for the reasons outlined above. We accept that the Pool House is located within *the pool surrounds* given it falls within the area surrounding the Pool which is presently enclosed by an existing barrier, but we do not consider that the Pool House is located within the *immediate pool surrounds*. What will constitute the *immediate pool surrounds* in any particular case will be a question of fact and degree having regard to the specific circumstances of the site under assessment.

125 It could never be the case that a habitable building or room could be considered to be part of the immediate pool surrounds. That conclusion is inescapable from the interpretation of the words "immediate pool surrounds" and the purpose of P2.7.1. That purpose is evident from O2.7 namely that the objective of Part 2.7 is to safeguard young children from drowning or injury in a swimming pool.

126 The consequence of the classification of the Pool House as a habitable building is that it forms part of the detached dwelling and is a Class 1a building under the Building Code. Just as the Dwelling must have a barrier between it and the pool and the immediate pool surrounds, so too must the Pool House. P2.7.1 does not differentiate between different types of Class 1 buildings (which include Class 1a buildings).

127 Given our findings above and for the reasons expanded upon further below, the barrier on the Land does not satisfy performance requirement P2.7.1(a) or (c) of the Building Code.

What does "a swimming pool...which is associated with a Class 1 building" mean in the deemed-to satisfy provision (Part 3.10.1.0)?

128 The assignment of a building classification plays an integral role in the interpretation and application of the provisions of the NCC. The provisions of the NCC cannot be applied without first identifying what the relevant building classification is for the building or scenario that is under assessment. The Dwelling and the Pool House are both Class 1a buildings, as defined. The deemed to satisfy provision, Part 3.10.1.0, refers to a swimming pool that is associated with a Class 1 building. A reference in the NCC to a particular building class is understood to

¹⁴⁷ T24 lines 10-18.

be a reference to all sub-classifications of that class.¹⁴⁸ Therefore, the reference to a Class 1 building in the deemed-to-satisfy provision includes a Class 1a building, which encompasses both the Dwelling on the Land and the Pool House.

129 The deemed to satisfy provision states that performance requirement P2.7.1 will be satisfied for a swimming pool with a depth of water more than 300mm and *which is associated with a Class 1 building*, if it (i.e., the swimming pool) has safety barriers installed in accordance with the relevant Australian Standards. It is necessary to consider what is meant by the phrase; *a swimming pool which is associated with a Class 1 building*, in order to understand and apply the provision. In doing so, once again we must consider the text, its context and statutory purpose which includes the objective of the performance requirements.¹⁴⁹

130 In *City Apartments Pty Ltd v Hall & Others*,¹⁵⁰ the Full Court considered the phrase “*in association with*” in the context of excavation or filling of land in association with the construction, conversion or alteration of, or addition to, a building. In that case, the Development Assessment Commission (DAC) (as it then was known) had granted a planning consent for the construction of a dwelling and associated excavation works on land in the Hills Face Zone. An application for judicial review was made to the Supreme Court in relation to the decision. At issue was whether the DAC or the Council was the appropriate planning authority. This depended on whether excavation and filling for a car park area, driveway and associated garage, being independent of and at different levels from that of the excavation and filling for the dwelling, was *in association with* the construction of a building within the meaning of Pt B(a) of the Schedule to cl 3(1) of Sch 10 of the *Development Regulations 1993* (SA) (now repealed). The Full Court said that the phrase “*in association with*”, “*is one of imprecise meaning*” and that it must be interpreted in its proper context.¹⁵¹ The Full Court found that given the excavation and filling were necessary for the provision of a car park area, driveway and associated garage, and that reasonably convenient vehicle access to any residence is a necessary feature of any residential development, that the cut and fill was considered to be “*in association with*” the construction of the dwelling.¹⁵² There was clearly an association with, a connection to, or a “*close link*”¹⁵³ between the carpark, driveway and garage with the dwelling *located on the same land*.

131 Having regard to the text, context and statutory purpose of the provision, we have determined that a swimming pool *in association with* a Class 1 building refers to a swimming pool that is located on land where a Class 1 building is also present.

¹⁴⁸ NCC 2019 Volume Two, Amendment 1, Section 1 Governing Requirements, Part A1 Interpreting the NCC, A1.0 Interpretation (4), at [14].

¹⁴⁹ Which are to safeguard young children from drowning or injury in a swimming pool.

¹⁵⁰ *City Apartments Pty Ltd v Hall & Others* [2001] SASC 337.

¹⁵¹ [2001] SASC 337, [21].

¹⁵² [2001] SASC 337, [25].

¹⁵³ [2001] SASC 337, [26].

Compliance with AS 1926.1-2012 and AS 1926.2-2007

132 In order for P2.7.1 to be satisfied, it is the swimming pool which must have barriers installed in accordance with AS 1926.1-2012 and AS 1926.2-2007. For the reasons which follow, having regard to the objective of the performance requirements which is to safeguard against young children drowning, the barrier must, by necessity, be erected between the swimming pool (being the hazard in question) and *any* Class 1 building (including a Class 1a building) that is located on the land. Our reasons for this conclusion follow.

The barrier on the Land

133 There was no dispute that the barrier on the Land complies with the Australian Standards, *in relation to the Dwelling on the Land*. It was accepted by the parties that a barrier was required to be erected between the Dwelling and the Pool and Spa. It is implicit in that position that the parties accept that the Dwelling is a Class 1 building and that a barrier is required to be in place separating the Pool and Spa from a Class 1 building (the Dwelling). Being a Class 1 building, the Dwelling is a *habitable* building. It is a building which contains habitable rooms. Occupants of a dwelling may enjoy any number of *normal domestic activities* within the habitable rooms of the dwelling, including; eating in a '*dining room*', sleeping in a '*bedroom*', playing and/or listening to music in a '*music room*', watching television in a '*television room*', sewing in a '*sewing room*', studying in a '*study*', watching a movie in a '*home theatre*', and so on.¹⁵⁴

134 Each of these habitable rooms may be occupied frequently and/or for extended periods of time by the occupants of a dwelling. There are other rooms which may be located within a dwelling that are specifically excluded from the definition of a habitable room in the Building Code, namely a bathroom, laundry, clothes drying room etc., *and other spaces of a specialised nature occupied neither frequently nor for extended periods*.

135 When an occupant of a Class 1 building is undertaking any of the activities listed above within a habitable room, and/or spending extended periods of time therein, what the occupant is *not doing* or *not able to do* to an appropriate and acceptable standard, level or degree, or indeed at all, is to supervise a young child that is within an outdoor swimming pool that is located on the property. That is of course *why* a barrier must be in place on the Land which isolates the Class 1 habitable building, the Dwelling, from the Pool and Spa. Both the 2014 Development and the reconfigured barrier approved in the 2023 Development continued to prohibit access from the Dwelling to the Pool and the Spa.

136 The Pool House is *also* a Class 1 building (in particular, a Class 1a building). It *also* contains *habitable* rooms. The same kinds of 'normal domestic activities' described above can *also* take place within the habitable rooms of the Pool House. These rooms can also be occupied frequently and/or for extended periods of time.

¹⁵⁴ All of the rooms listed in italics in this paragraph are *habitable rooms* as defined in the Building Code.

Given that is so, there is no logical or rational basis to accept that on the one hand a barrier is required between the Dwelling and the Pool and Spa, but on the other hand, a barrier is not required between the Pool House and the Pool and Spa. The building classification for each building is the same under the NCC. There is no reason why the two buildings should be considered differently in this regard given they are both Class 1 buildings. *Each* of the buildings exist on land where a swimming pool is located. The risk of a young child drowning will exist whenever a young child is located within any Class 1 habitable building when there is no barrier in place, or where a non-compliant barrier is in place between that Class 1 building and the hazard.

137 To illustrate, if one of the two main habitable rooms in the Pool House was being used as a bedroom (and there is no reason why such a room could not exist in the Pool House given its building classification) it is conceivable that the occupant of that bedroom may fall asleep. Notwithstanding the fact that a child may have had to first pass through the existing child resistant barrier on the Land to gain access to the Pool Area, if the young child happens to exit the Pool House through the glass sliding doors, the person asleep in the bedroom is no longer able to supervise the child within the Pool or Spa or within the immediate pool surrounds, because, obviously, they are asleep. Similarly, if one of the two main habitable rooms in the Pool House was being used as a television room or a home theatre (quite possibly with curtains drawn eliminating entirely any visibility of the Pool and the Spa and the immediate pool surrounds) it is also possible that those in occupation may have their attention diverted away from a young child who, unbeknownst to those watching the television or similar, may have left the Pool House through the glass sliding doors, and entered the Pool or the Spa and the immediate pool surrounds.

138 In addition, as observed on the view, which was confirmed by Mr Neaylon when he gave evidence, depending on where an occupant is located within either of the two main habitable rooms within the Pool House, between 15-30% of the Pool and the surrounding pool area are not visible. Appendix B highlights the importance of the whole of the pool area being able to be viewed. It provides that the type of barrier and the location of a pool within a property should permit viewing through or over a barrier so that the pool area may be directly viewed. Although there is no barrier per se between the Pool House and the Pool and the Spa, the clear intention of the provision is that views to a pool and the immediate pool surrounds, within a pool area, must be clear and unobstructed so as to ensure that adequate surveillance can occur.

139 If a young child is in the Pool House, the risk of that child drowning is not reduced in a meaningful way by virtue of the fact that the child has first passed through a child resistant gate in the existing barrier on the Land to gain access to the Pool House. The risk is significantly reduced however if there is a barrier in place restricting access from the Pool House itself to the Pool and the Spa and the immediate pool surrounds. If there is a barrier in place between any habitable

room or habitable building and a swimming pool, the risk of a young child drowning will be significantly reduced. The erection of a barrier between any habitable room or habitable building and a swimming pool, ensures that:

1. a barrier is provided to the swimming pool that is continuous for the *full extent* of the hazard (P2.7.1(a)); and
2. a barrier is provided which restricts access of young children to the pool and the immediate pool surrounds (P2.7.1(c)).

140 Given our findings, all of the arguments in support of Ground 2 advanced by the appellant must be rejected. For completeness, we will briefly deal with each of the arguments in turn.

There is an existing barrier in place around the “pool area” which complies with the Australian Standards

141 A “pool area” is defined in the Standards as “*the area that contains the pool and is enclosed by a safety barrier*”. The preface to AS 1926.1-2012 which the appellant relies on, provides that the objective of that Standard is to assist pool owners/users in avoiding pool-related drowning by the installation of a barrier; “...*designed to restrict entry to the swimming pool area by young children*”.¹⁵⁵ The preface to AS 1926.2-2007 also provides that the objective of that Standard is to ensure that barriers are; “...*designed to deny, delay or detect unsupervised entry to the swimming pool area by young children*”.¹⁵⁶ The appellant contends that there is a barrier in place which restricts or prevents entry to the *swimming “pool area”*, as defined. On that basis she claims that the barrier is compliant.

142 However, that argument can only be sustained if the Court is to accept that it is the appellant, or any pool owner for that matter, who decides *where* a barrier is to be located on the relevant land. If that argument is accepted, the pool area would be whatever area the landowner created by erecting a barrier at a location that he or she selected.

143 We reject that argument. The appellant submits that the Pool House is a free standing building within the Pool Area that is inaccessible other than through the child resistant gate in the safety barrier. She identified the extent of the barrier which included three of the four external walls of the Pool House and the glass barrier containing the safety gate. For the reasons articulated earlier, that is the incorrect approach in assessing whether the requirements relating to the construction and safety of swimming pools *under the Building Code* are satisfied.

144 When the provisions of the Building Code are considered first, it is clear that the barrier must be in place between the swimming pool and *any* Class 1 building on the land. If a barrier is erected between the Pool House and the Pool and Spa *and* the Dwelling and the Pool and Spa, as required under the Building Code, it

¹⁵⁵ Exhibit R1 at [52].

¹⁵⁶ *Ibid* at [101].

will be the area that contains the Pool and Spa that is enclosed by *that* barrier (which barrier prohibits access from both the Dwelling *and* the Pool House) that will constitute the “*pool area*”. *That* is the area to which access must be denied or restricted when considering the provisions of the Australian Standards. Although the existing barrier on the Land may comply with the Standards in relation to the Class 1 Dwelling, it does not comply with respect to the Class 1a Pool House.

Figure 2.1 in AS 1926.2-2007

145 The appellant argued that none of the four diagrams in Figure 2.1 in AS 1926.2-2007 had application in this case. She said that each of these were ‘*typical examples*’ only of a barrier location for the purposes of clause 4.2 of AS 1926.2-2007. The fact that the existing scenario at the Land was not depicted in one of those four diagrams does not result in the Standards being offended. She said that it was the three criterion in clause 4.2 which must be met with respect to the existing barrier that is in place. Once again, the appellant has approached the assessment in reverse by first applying the text of the Standards to the existing barrier which she herself has placed on the Land. It is true that the existing barrier on the Land, which separates *the Dwelling* from the Pool and the Spa, does meet the three criterion in clause 4.2. However, for the reasons previously identified, that is not the end of the matter. The Building Code requires a barrier to also be in place between the Pool House and the Pool and Spa, and there is no barrier in place.

146 The Council submitted that the southern elevation of the Pool House formed part of the barrier and because it contained a set of glass sliding doors, it did not comply with the provisions of the Standards. This is because since 2011 a child resistant door set is no longer permitted to form part of a barrier to an outdoor pool. We agree that the southern elevation of the Pool House which contains a set of glass sliding doors does not comply with the provisions of the Standards. That being so, the three criterion in clause 4.2 cannot be said to be satisfied.

147 We accept that it does not necessarily follow that if an existing barrier for an outdoor pool is not depicted in any of the four diagrams shown in Figure 2.1, that the barrier will be non-compliant. The barrier approved in the 2014 Development incorporated a dog leg design and that configuration is not depicted in any of the four typical examples shown in Figure 2.1 either. However, the barrier approved in the 2014 Development achieved the same result when considering the diagrams shown in Figure 2.1 because, as approved, there was no access to the Pool and the Spa from the Pool House in the 2014 Development. The diagrams in Figure 2.1 reinforce and support the fact that a barrier must be in place between a Class 1 building (which includes a Class 1a building) and an outdoor pool.

Appendix B in AS 1926.2-2007

148 The appellant argued that although Appendix B does not encourage buildings to be located within a pool area, it does not strictly prohibit it. She submitted that there was nothing in the Standards which prohibits the Pool House being located within the Pool Area. Appendix B provides:

Where possible, tool sheds, garages, barbecues and clotheslines should be located outside the pool area to reduce the likelihood of self-closing gates being propped open in order to gain access.

149 We agree that Appendix B contemplates that there may be situations where certain buildings or structures are located within a pool area, but it clearly discourages it for the reasons provided. It does not follow that any buildings are therefore permitted to be located within a “pool area” (i.e., within the area which contains the pool that is enclosed by a barrier). The buildings referred to in Appendix B are Class 10 non-habitable buildings. A Class 1 habitable building is not referred to at all in the relevant passage relied upon by the appellant. This matter involves a Class 1a building and not a Class 10 building. It is not necessary for the Court to rule on what the position is with respect to Class 10 buildings within a “pool area”. We have already identified however that a small shed housing the infrastructure associated with a swimming pool could quite possibly be located within the *immediate pool surrounds* given it is *directly associated with* the use of the swimming pool, and because it would be accessed infrequently and not for extended periods of time. A non-habitable building would generally not create distractions or become an impediment to the provision of adequate supervision to young children that may be within the pool or the immediate pool surrounds given the frequency and duration of use. Appendix B does not support the submission that a Class 1 building may be located within a “pool area”.

The 2016 version of the Building Code

150 There was a specific provision in the 2016 version of the Building Code which required a compliant barrier to be in place between a habitable room or habitable building located in a “pool area”, and the pool itself. We reject the argument that the insertion and subsequent deletion of this provision means that it is no longer a requirement of the Building Code that a barrier must be in place in that scenario. We agree with the submissions of the Council that such a provision is unnecessary and superfluous given our assessment and consideration of the relevant provisions of the Building Code, and the relevant Australian Standards, which support our finding that a barrier is required to be in place between any Class 1 or Class 1a building and a swimming pool. An additional provision such as that which existed in the 2016 version of the Building Code would serve no purpose because a habitable room or a habitable building are each Class 1a buildings or structures. The provisions of the Building Code already require a barrier to be in place between such buildings and a swimming pool.

Conclusion in relation to Ground 2

151 We find that in order for the *deemed to satisfy* provision to be met (Part 3.10.1.0), that the Pool and the Spa on the Land must have a barrier installed between “it” and *any* Class 1 building that is located on the Land. We find that while there is a safety barrier installed in accordance with AS 1926.1 and 1926.2 between the Dwelling and the Pool and the Spa, there is no compliant safety barrier between the Pool House and the Pool and the Spa as required under the Building Code. Accordingly, the owner has not ensured that the designated safety features have been installed and maintained in accordance with the prescribed requirements, namely, the requirements relating to the construction and safety of swimming pools under the Building Code, as it applied at the time the application for either the 2014 Development or the 2023 Development was made. Her failure to comply with her legislative obligations constitutes a breach of s 156 of the Act.

152 Ground 2 is dismissed.

Ground 1

153 The decision of the Full Court in *Sullivan v District Council of Riverton*,¹⁵⁷ requires that breaches of the legislation should be identified with “*reasonable particularity*”.¹⁵⁸ It is essential that the terms of any enforcement notice are clear and unambiguous as to the nature of the breach and what is required to put it right. A notice which does not achieve this is not a proper notice.

154 The Notice is a reasonably detailed one. It identified the following matters in reasonably clear terms which we have summarised below, namely that:

- (i) the Pool House is a Class 1a building (*paragraph 3*);
- (ii) the barrier approved in the 2014 Development complied with the Building Rules in force at the time, and the Australian Standards *because* there was a barrier between the Pool House and the Pool (*paragraph 4*);
- (iii) following the grant of development approval to the 2023 Development, and following its implementation, an inspection revealed that the sliding doors of the Pool House opened directly to the Pool and the Spa and that a *lack of a barrier* between the Pool House and the Pool and Spa *constituted a breach of the Act* (*paragraph 5*);
- (iv) the Act and the SPS Regulations together set out the statutory scheme with respect to swimming pool safety, and in particular the requirements of r 6(1)(b) of the SPS Regulations were set out in the Notice itself (*paragraphs 14.1, 14.2 and 14.3*);

¹⁵⁷ (1997) 69 SASR 234.

¹⁵⁸ (1997) 69 SASR 234 at 247.

- (v) a designated owner (which included the appellant) is obliged to comply with those requirements and that a failure to do so constitutes a breach of the Act (*paragraph 14.5*);
- (vi) the appellant had breached the Act because she had failed to install and maintain a swimming pool safety barrier between the Pool House and the Pool and the Spa (*paragraph 14.6*); and
- (vii) the sliding doors within the Pool House did not comply with the *Building Code* because a person could access the Pool and the Spa without being required to pass through a child resistant gate and barrier as required by the relevant Australian Standards.

155 The appellant was critical of the Notice arguing that it contained “*substantial deficiencies*” because it failed to identify which provisions in particular of the Building Code and the Australian Standards were offended in this case. With respect to the Standards, it was argued that there was no distinction made between AS1926.1-2012 and AS1926.2-2007. She argued that she was entitled to know what was alleged against her, that the Notice was defective in this regard and should be set aside on that basis.¹⁵⁹

156 In reviewing the Notice there can be no doubt that the breach of the Act in this case related to the lack of a barrier between the Pool House and the Pool and the Spa. We do not consider that any additional information would have made the alleged breach of the Act as identified in the Notice any clearer than it already was. The Council’s response to the appeal notice¹⁶⁰ which was filed after the proceedings were commenced did not mean that the Notice was not readily understood in its current form. That document was filed to assist the parties and the Court to understand the nature of the issues to be argued at the hearing, including, the basis for the Council’s collateral challenge to the building consent issued by the private certifier.

157 In the matter of *Amberich Pty Ltd v The City of Mount Gambier*¹⁶¹ (*Amberich*), which involved an appeal against a s 84 enforcement notice issued under the *Development Act*,¹⁶² the Court held that it was relevant to construe the notice against the history of the use of the land as known to both parties.¹⁶³ His Honour Judge Costello said:

This is not a case of an appellant receiving, for the first time without warning, a notice from the Council. In this case almost the complete opposite is true, namely an appellant using the land for the storage of salvage materials without approval, then lodging a development application, the Council refusing that application and this Court upholding that refusal.

¹⁵⁹ Appellant, Written submissions of appellant, 16 August 2024, [97].

¹⁶⁰ Respondent, Amended response to originating appeal notice by respondent, (undated).

¹⁶¹ [2013] SAERDC 12.

¹⁶² The equivalent provision of the repealed *Development Act* to a s 213 enforcement notice issued under the *PDI Act*.

¹⁶³ [2013] SAERDC 12, [11].

I do not consider that, in such circumstances, the appellant can be heard to complain about an alleged lack of precision in the description of the breach or and the required remedy in quite the same way as a person receiving a Notice “out of the blue” as it were.¹⁶⁴

158 As was the case in *Amberich*, the Notice in this case did not just come “out of the blue”. Prior to the issue of the Notice in April 2024, the Council had issued an enforcement notice on 7 November 2023 following Mr Neaylon’s inspection the previous month. That earlier notice had been withdrawn by the Council on a without prejudice basis to enable the Council to engage with the appellant’s legal representatives in relation to the matter.¹⁶⁵ There were numerous communications between the parties prior to the issue of the Notice which are set out in Mr Neaylon’s Affidavit. Mr Neaylon also gave evidence about that.¹⁶⁶ This included correspondence between Mr Riches and Mr Neaylon in addition to the appellant’s legal representatives and the Council’s legal representatives.¹⁶⁷

159 In that context, the recipient of the Notice would have been clear as to what the Notice was directing her to do particularly in light of the communications between the parties leading up to the issue of the Notice between November 2023 and April 2024. As submitted by the Council, the issue was straight forward and had been expansively agitated in the prior correspondence which was itself referred to in the Notice.¹⁶⁸ We have determined that the Notice did indicate in reasonably clear terms the nature of the breach and that it was clear and unambiguous in its terms.¹⁶⁹

160 The Notice also indicates in reasonably clear terms what is required in order to rectify the breach. The Notice directs that the appellant is required to install a compliant safety barrier between the Pool House and the Pool and Spa, which barrier must comply with the relevant Australian Standards, within two months. The Council was not required to direct precisely how or where such a barrier was required to be placed on the Land. The only requirement, when considering the Notice in context, is that a barrier must be in place between the Pool House and the Pool and Spa. The appellant could elect to reinstate the 2014 barrier, or she could choose to install a barrier without a dog leg design which would run in a straight east west direction. There may have been other options available to the appellant but it would be a matter for the appellant to ensure that, whatever barrier was proposed, it would need to comply with the Australian Standards. It was correct to indicate that both parts of the relevant Standards were required to be complied with. Part 1 of the Standards (AS1926.1-2012) deals with the technical requirements of any barrier whereas Part 2 of the Standards (AS1926.2-2007) is concerned with the locational requirements of any barrier. Both parts are relevant

¹⁶⁴ Ibid, [11]-[12].

¹⁶⁵ See paragraph 10 of the Notice.

¹⁶⁶ T26.

¹⁶⁷ Exhibit R7 at [17] – [64].

¹⁶⁸ Respondent, Respondent’s outline of submissions, 16 August 2024, [63].

¹⁶⁹ *Sullivan v District Council of Riverton* (1997) 69 SASR 234, at [249].

in this case. Indeed, *all* parts of *both* parts are relevant with respect to the placement of any barrier on the Land. The only way the Notice could have been made any clearer as to what the Council's requirements were would have been to annex the entirety of both parts of the Australian Standards. We don't consider that this was necessary. The relevant standards were referenced in the Notice and it was a matter for the recipient of the Notice to determine how the barrier was going to meet the provisions of the Standards, while noting that the barrier must be erected between the Pool House and the Pool and Spa.

161 Ground 1 is dismissed.

Ground 4

The issue of a development approval by the Council to the 2023 Development

162 The appellant submits that in issuing the development approval to the 2023 Development, which approval depicted the reconfigured barrier permitting access to the Pool and the Spa through the glass sliding doors of the Pool House, the Council cannot now allege that the building consent does not comply with the Building Rules. She contends that the approval was issued on the basis that the proposed development complied with the Building Code,¹⁷⁰ and that absent a judicial determination as to invalidity, the Council must accept that the consent does comply with the Building Rules. It was otherwise submitted that the Court should quash the Notice based on the Council's failure to take issue with the barrier at the time of the grant of the development approval which the appellant has relied on to her detriment (if the Notice stands).

163 Ground 4 raises three issues:

1. is a decision-maker under the Act able to revisit an earlier administrative decision which he or she considers to be made without jurisdiction?
2. did the Council make an earlier decision that the 2023 Development, including the existing barrier, complied with the Building Rules and now seeks to revisit that decision?
3. in any event, are the requirements imposed by s 156 of the Act and the SPS Regulations subject to or avoided by a development authorisation?

Revisiting an earlier administrative decision

164 The appellant placed reliance on the decision of McWilliam AsJ in *Capital Recycling Solutions Pty Ltd v Planning and Land Authority of the ACT*¹⁷¹ in which it was held that there was a line of authority to the effect that invalidity is required to be established by a judicial rather than an administrative determination and any decision tainted by jurisdictional error is valid and effective in law until such a

¹⁷⁰ Appellant, Written submissions of the appellant, 16 August 2024, [98].

¹⁷¹ [2019] ACTSC 58.

determination is made.¹⁷² It was further held that had particular application in the planning context where the system would be unworkable if a decision could be administratively revisited.¹⁷³

165 That statement of principle appears inconsistent with the observation made by Gaudron and Gummow JJ in *Minister for Immigration & Multicultural Affairs v Bhardwaj (Bhardwaj)*:¹⁷⁴

There is, in our view, no reason in principle why the general law should treat administrative decisions involving jurisdictional error as binding or having legal effect unless and until set aside. A decision that involves jurisdictional error is a decision that lacks legal foundation and is properly regarded, in law, as no decision at all. Further, there is a certain illogicality in the notion that, although a decision involves jurisdictional error, the law requires that, until the decision is set aside, the rights of the individual to whom the decision relates are or, perhaps, are deemed to be other than as recognised by the law that will be applied if and when the decision is challenged.

166 In *Jadwan Pty Ltd v Secretary, Department of Health & Aged Care*,¹⁷⁵ the Full Federal Court explained the apparent conflict between those decisions and held that *Bhardwaj* is not authority for the universal proposition that jurisdictional error leads to the decision having no consequences whatsoever but instead supports the proposition that the legal and factual consequence of the decision will depend upon the particular statute.

167 We consider that the language of the Act, the subject matter of the legislation and the consequences to the parties all support the proposition that the Council is not able to revisit a development approval that it has granted even if it takes the view that its initial decision was subject to jurisdictional error. As to the first matter, the Act sets out how a decision can be challenged. It provides for circumstances in which the applicant may seek to vary or cancel a development authorisation. It does not permit the Council to seek to vary or discharge its approval. As to the second and third matters, the planning system would be unworkable if a decision can be later revisited. The parties can be expected to place reliance and spend money on the basis of an approval.

Has the Council made a decision that the 2023 Development including the existing barrier complied with the Building Rules

168 Section 99 of the Act provides:

(1) If—

(a) a proposed development involves the performance of building work; and

¹⁷² Ibid at [20].

¹⁷³ Ibid at [22].

¹⁷⁴ (2002) 209 CLR 597 at [54]; [2002] HCA 11.

¹⁷⁵ [2003] FCACF 288 at [42], See also *Martinovic v Workers Compensation Commission of New South Wales* [2019] NSWSC 1532 at [103]-[109]; *Jackson v Purton* [2011] TASSC 28 at [54].

- (b) a relevant authority determines to act under this subsection, the relevant authority may—
 - (c) refer the assessment of the development in respect of the Building Rules to the council for the area in which the proposed development is to be undertaken; or
 - (d) require that the assessment of the development in respect of the Building Rules be undertaken by a building certifier.
- (2) If subsection (1) applies—
- (a) in the case of subsection (1)(c)—the council for the area in which the development is to be undertaken will be the relevant authority for the purposes of—
 - (i) assessing the development against and, if appropriate, granting a consent in respect of, the relevant provisions of the Building Rules; and
 - (ii) if appropriate, granting development approval; and
 - (b) in the case of subsection (1)(d)—
 - (i) the building certifier will be the relevant authority for the purposes of assessing the development against and, if appropriate, granting a consent in respect of, the relevant provisions of the Building Rules; and
 - (ii) the council for the area in which the development is to be undertaken will be the relevant authority for the purposes of, if appropriate, granting development approval.
- (Our underlining).

169 In accordance with the statutory scheme set out above, a building consent may be granted to a development by a relevant authority, being either a council or a building certifier¹⁷⁶ (also known as a private certifier which was the terminology used under the *Development Act 1993* (SA) (now repealed)). A building consent may be granted once a relevant authority has assessed a development against and granted a consent in respect of the relevant provisions of the Building Rules.¹⁷⁷ In this case, the appellant engaged a building certifier, PBS, to assess the 2023 Development against the Building Rules and for the purpose of granting a building consent to that development.¹⁷⁸

170 Section 118 of the Act sets out the statutory framework with respect to the grant of a building consent as follows:

- (1) If the regulations provide that a form of building work complies with the Building Rules, any such building work must be granted a building consent (subject to such conditions or exceptions as may be prescribed by the regulations).

¹⁷⁶ *Planning, Development & Infrastructure Act 2016* (SA), s 92.

¹⁷⁷ *Planning, Development & Infrastructure Act 2016* (SA), s 102(1)(b).

¹⁷⁸ The Building Rules is defined in s 3 of the Act to include the Building Code, as it applies under the Act.

- (2) Subject to [subsection \(6\)](#), a development that is at variance with the Building Rules must not be granted a building consent unless—
 - (a) the variance is with the performance requirements of the Building Code or a Ministerial building standard and the Commission concurs in the granting of the consent; or
 - (b) the variance is with a part of the Building Rules other than the Building Code or a Ministerial building standard and the relevant authority determines that it is appropriate to grant the consent despite the variance on the basis that it is satisfied—
 - (i) that—
 - (A) the provisions of the Building Rules are inappropriate to the particular building or building work, or the proposed building work fails to conform with the Building Rules only in minor respects; and
 - (B) the variance is justifiable having regard to the objects of the Planning and Design Code or the performance requirements of the Building Code or a Ministerial building standard (as the case may be) and would achieve the objects of this Act as effectively, or more effectively, than if the variance were not to be allowed; or
 - (ii) in a case where the consent is being sought after the development has occurred—that the variance is justifiable in the circumstances of the particular case.
- (3) No appeal lies against—
 - (a) a refusal of concurrence by the Commission under [subsection \(2\)\(a\)](#); or
 - (b) a refusal of building consent by a relevant authority if the Commission has refused its concurrence under [subsection \(2\)\(a\)](#); or
 - (c) a condition attached to a consent or approval that is expressed to apply by virtue of a variance with the performance requirements of the Building Code or a Ministerial building standard.
- (4) A relevant authority may, at the request or with the agreement of the applicant, refer proposed building work to the Commission for an opinion on whether or not it complies with the performance requirements of the Building Code or a Ministerial building standard.
- (5) In addition, regulations made for purposes of this subsection may provide that building work of a prescribed class must not be granted a building consent unless the Commission concurs in the granting of the consent.
- (6) If an inconsistency exists between the Building Rules and the Planning Rules in relation to a State heritage place or a local heritage place—

- (a) the Planning Rules prevail and the Building Rules do not apply to the extent of the inconsistency; but
- (b) the relevant authority must, in determining an application for building rules consent, ensure, so far as is reasonably practicable, that standards of building soundness, occupant safety and amenity are achieved in respect of the development that are as good as can reasonably be achieved in the circumstances.
- (7) A relevant authority must seek and consider the advice of the Commission before imposing or agreeing to a requirement under [subsection \(6\)](#) that would be at variance with the performance requirements of the Building Code or a Ministerial building standard.
- (8) **Subject to this Act, a relevant authority must accept that proposed building work complies with the Building Rules to the extent that—**
 - (a) such compliance is certified by the provision of technical details, particulars, plans, drawings or specifications prepared and certified in accordance with the regulations; or
 - (b) such compliance is certified by a building certifier.
- (9) No act or omission by a relevant authority in good faith in connection with the operation of [subsections \(6\)](#) or [\(8\)\(a\)](#) (other than where a certificate under [subsection \(8\)\(a\)](#) is given by a building certifier) subjects the relevant authority to any liability.
- (10) The relevant authority may refuse to grant a consent in relation to any development if, as a result of that development, the type or standard of construction of a building of a particular classification would cease to conform with the requirements of the Building Rules for a building of that classification.
- (11) If a relevant authority decides to grant building consent in relation to a development that is at variance with the Building Rules, the relevant authority must, subject to the regulations, in giving notice of its decision on the application for that consent, specify (in the notice or in an accompanying document)—
 - (a) the variance; and
 - (b) the grounds on which the decision is being made.

(Our underlining and emphasis).

171 Section 36 of the repealed act was in almost identical terms to s 118 of the Act set out above. In the matter of *Liu & Anor v City of Playford (Liu)*,¹⁷⁹ the appellants appealed against a decision of the City of Playford to refuse to grant a development approval in circumstances where they had obtained a Building Rules consent (the equivalent of a building consent under the Act) from a private certifier. In that case the council withheld development approval on the basis that

¹⁷⁹ [2014] SAERDC 31.

they considered the Development Plan consent (the equivalent of a planning consent under the Act) was inconsistent with the Building Rules consent that had been granted because the class assigned to the proposed development by the certifier was incorrect.

172 His Honour Judge Costello considered the terms of s 36 of the repealed act and determined that it was “*tolerably clear from a reading of those provisions that...a Council must accept that an assessment (that the building work complies with the Building Rules) is correct if the assessment is so certified by a private certifier*”.¹⁸⁰

173 His Honour then went on to consider r 46 of the *Development Regulations 2008* (now repealed) which is in similar terms to r 53(5) and (6) of the General Regulations. These provisions set out the prerequisites that must be satisfied before a development approval can be granted under the Act. Regulations 53(5) and (6) of the General Regulations provides:

- (5) Despite a preceding subregulation, where a council is acting as the relevant authority for the purpose of granting the final development approval under the Act and the council has received notice, via a scheme applying under the SA planning portal, that all relevant consents have been granted under Part 7 of the Act (and that none of those consents have lapsed), the council must, within 5 business days—
 - (a) if the consents are consistent—grant the final development approval; or
 - (b) if 2 or more consents are inconsistent—take reasonable steps to inform the applicant of the inconsistency.
- (6) If or when the council is satisfied that the consents are consistent with each other after taking steps under subregulation (5)(b), the council must grant the final development approval within 5 business days.

174 With respect to the equivalent provision to r 53 (5) and (6) of the General Regulation under the repealed regulations (regulation 46), in *Liu* His Honour said:

It is readily apparent, at the outset, that reg 46 is concerned to ensure that all consents necessary under Part 4 Division 1 of the Act have been obtained. These are the consents identified in s 33 of the Act which provide that a development is approved only if ‘*a relevant authority has assessed a development against and granted consents with respect to*’ various matters which, for these purposes, are confined to assessments against the Development Plan and the Building Rules.

If the Council is satisfied that the relevant consents have been obtained, reg 46 then obliges the Council to determine whether the consents are ‘consistent with each other’.

¹⁸⁰ [2014] SAERDC 31, [6].

Importantly there is no suggestion in reg 46 that the Council need concern itself with the provisions of Part 6 of the Act with respect to the Classification of a building.

...

In such circumstances, there is no warrant to import into the wording of reg 46 a power for a Council to embark upon a fresh consideration of a building's classification. The only role for the Council at this stage is to examine the consents issued under Part 4. If these consents are consistent the Council must issue the approval. (emphasis in original).

175 When considering the scheme of the Act and General Regulations, it is evident that upon the receipt of a building consent granted by a building certifier, the Council is obliged to accept that the relevant consent complies with the Building Rules. Further, in determining whether to grant a development approval to a development, the Council's role is limited to a consideration of those matters identified in r 53(5) of the General Regulations, namely (i) whether all necessary consents have been obtained, (ii) whether any of the consents have lapsed and (iii) whether the consents are consistent. Provided all of those matters are satisfied, the Council *must* then issue a development approval. As was the case in *Liu*, there is also no suggestion in r 53(5) that the Council need concern itself with any other matters.

176 Section 118(8)(b) of the Act specifically directs the Council to not review the merits of the building consent that may be issued by a building certifier. What follows from this is that the appellant's argument that the Council issued the development approval to the 2023 Development *on the basis that* the proposed development complied with the Building Code must be rejected. The Council did not issue the development approval on that basis at all. The Council issued the development approval *on the basis that* all of the limited matters which it was required to consider in r 53(5) were met. Mr Neaylon gave evidence about what occurred in this case, which was consistent with what the Act and associated regulations contemplate.¹⁸¹ The Council did not, nor was it required to, consider whether the 2023 Development complied with the Building Rules. It was *obliged* to accept the certifier's decision and it was *required* to issue the development approval in the circumstances.

177 For the same reasons we also reject the appellant's criticism of the Council for failing to alert her to the fact that the building consent didn't comply with the provisions of the Building Code at the time the development approval was granted. There is no evidence that the Council was aware of that fact at the time that development approval was granted. It is quite likely that the Council may have only first become aware that the building consent didn't comply with the provisions of the Building Code when Mr Neaylon undertook his inspection of the Land in October 2023, which was after the reconfigured barrier had already been erected on the Land. However, on the evidence before the Court, no finding can

¹⁸¹ T10 lines 28-38.

be made as to when the Council became aware that the building consent did not comply with the provisions of the Building Code.

Are the requirements imposed by s 156 of the Act and the SPS Regulations avoided by a development authorisation

178 The Council argues that the requirements as to swimming pool safety, which are set out in s 156 of the Act and the SPS Regulations are not subject to or avoided by a development authorisation that has been granted under the Act. We agree. Section 156 of the Act provides that an owner must comply with the prescribed requirements which are set out in the SPS Regulations. Regulation 6(1)(b) provides what those requirements are, which in this case, are the requirements relating to the construction and safety of swimming pools under the Building Code at the relevant time. There is no mention of a development approval or a development authorisation in r 6(1)(b) or in s 156 of the Act. The Council submits that r 6(1)(b) was drafted in this way deliberately in recognition of the priority for public safety.¹⁸² Indeed, the present case is a good example of why it is that s 156 of the Act *should* sit outside the development approval process. The Council should not be bound to accept the subjective opinion of a building certifier that the requirements relating to the construction and safety of swimming pools under the Building Code have been satisfied. A council is a designated authority charged with the duty and responsibility to ensure that the legislation with respect to swimming pool safety is complied with. It is appropriate that it can undertake its own assessment of whether the designated safety features with respect to a swimming pool have been installed and are being maintained on land within its area pursuant to s 156 of the Act. We accept that section 118(8) of the Act requires a relevant authority to accept that proposed building work complies with the Building Rules to the extent that it is certified by a building certifier. However, that subsection is *subject to* the Act. The clear intention of s 156 of the Act and the SPS Regulations is that the Council is *not required to accept* such certification with respect to swimming pool safety because r 6(1)(b) of the SPS Regulations requires an objective assessment to be made against the provisions of the Building Code and not a consideration or review of a building certifier's decision. For all of these reasons, *Capital Recycling Solutions* can be distinguished on that basis.

179 Ground 4 is dismissed.

Collateral challenge

180 Given our findings in relation to the manner in which s 156 of the Act operates outside the development approval process under the Act, it is not strictly necessary for the Court to consider whether it is permissible in these proceedings for the Council to mount a collateral challenge to the certifier's decision. This is because the certifier's decision is not relevant to the question of whether the owner is in breach of s 156 of the Act. However, for arguments sake, if it was necessary

¹⁸² T78 lines 19-26.

for the Court to consider whether such a challenge is permissible in these proceedings, we have determined that in the circumstances of this particular case, it ought not be permitted. A collateral challenge was described by McHugh J in *Ousley v The Queen*¹⁸³ as follows:

A collateral attack on an act or decision occurs when the act or decision is challenged in proceedings whose primary object is not the setting aside or modification of that act or decision. In *In re Preston*, however, Lord Scarman used the term "collateral challenge" to include any process challenging a decision - including an application for judicial review - other than a proceeding by way of appeal. This use of the term is readily intelligible. However, with the widespread availability of judicial review procedures, it conduces to clarity of thought, in my opinion, if the term "collateral challenge" is confined to challenges that occur in proceedings where the validity of the administrative act is merely an incident in determining other issues.¹⁸⁴

181 The Council submitted that in the ordinary course, administrative decisions are open to collateral challenge by the Court when the Court is dealing with an issue properly arising as an element in a justiciable controversy of which the Court is seized.¹⁸⁵ In *Jacobs*,¹⁸⁶ Besanko J reviewed the authorities on collateral challenge and held that there may be good reasons to allow a collateral challenge subject to the relevant factors set out at [93]:

I do not think there is any doubt that in some cases there are good reasons to allow a collateral challenge and in other cases there are good reasons to deny it. On occasions there may be cases in which a statutory provision will provide a clear answer to the question whether a collateral challenge is permitted in a particular case. Other possible factors which might be relevant in deciding that question have been discussed in the authorities and in the academic literature...The factors identified include the following:

1. Are the grounds of challenge likely to involve the adducing of substantial evidence?
2. If a collateral challenge is permitted, will all proper parties be heard before the court or tribunal in which the collateral challenge is to be heard?;
3. In the particular case, does the allowing of a collateral challenge by-pass the protective mechanisms associated with judicial review proceedings such as the rules as to standing, delay and other discretionary considerations?;
4. Is there a statutory provision that bears in one way or another on the question of whether a collateral challenge should be permitted?;
5. Is the issue raised by the collateral challenge clearly answered by authority?;
6. Are there other cases pending which raise the same issue?;

¹⁸³ (1997) 192 CLR 69.

¹⁸⁴ (1997) 192 CLR 69, at [98]-[99].

¹⁸⁵ *Attorney-General (Cth) v Breckler* (1999) 197 CLR 83 at [36]; *Cairo v The Corporation of the City of Norwood Payneham & St Peters & Anor* [2018] SAERDC 11 per Costello J at [16].

¹⁸⁶ [2006] SASC 32.

7. (Possibly) is there a more appropriate forum in terms of expertise and perhaps court procedures such that a collateral challenge should not be permitted?

(Our underlining).

182 The Council also relied on a decision of this Court in *Cairo* to support its argument that the Court can entertain a collateral challenge of the certifier's decision in these proceedings. In *Cairo*, the appellant had appealed against a decision of the council to refuse to grant development approval to a proposal asserted by the appellant to be for a complying kind of development, under the repealed act. The appellant submitted that the council was obliged to accept the decisions of the private certifier purporting to grant a Development Plan consent and Building Rules consent respectively. The council asserted that the decisions were a nullity. The Court was asked to determine whether the council's challenge to the decisions constituted an impermissible collateral challenge. In that case, the Court determined that it had the power to entertain the collateral challenge. Clearly in that case, the validity of the purported consents was a critical issue in the determination of the proceedings. In addition, and importantly, the certifier was a party to the proceedings.

183 In this case the certifier was not a party to the proceedings. He was not given an opportunity to make submissions to the Court or to defend his decision. That being so, had the Court entertained the collateral challenge, all of the proper parties would not have been heard before the Court. We consider that this is an important and distinguishing feature when considering the authorities on this issue. Had the private certifier, Mr Riches, been joined as a party to the proceedings, we may have reached a different conclusion.

The decision in *Thorpe v City of Unley*

184 In 2006, a full bench of this Court comprising a judge and a building commissioner handed down their decision in *Thorpe v City of Unley*.¹⁸⁷ That case involved an appeal against a decision by the council to withhold development approval to a development comprising a rumpus room or pool entertainment room that was located inside the fenced surrounds of an existing swimming pool at the applicant's residential premises. The council alleged that the building rules consent which it had received from a private certifier was inconsistent with a condition of the planning consent which had been granted. The condition in question required the applicant for consent to ensure that the swimming pool safety fencing complied with the relevant Australian Standards in force at that time.¹⁸⁸ Those standards have since been superseded.

¹⁸⁷ [2006] SAERDC 81.

¹⁸⁸ *Australian Standard AS 1926.1–1993 Fencing for Swimming Pools and AS 1926.2–1995 Swimming Pools Safety – Location of Fencing for Private Swimming Pools.*

185 The Court was asked to determine a preliminary point in that matter, namely, whether the external doors of the proposed room, as certified, met the requirements of the relevant planning condition. In that case, the room was located within the pool surrounds which contained a swimming pool. The rear or southern and the eastern walls of the room constituted part of the required barrier to the pool, as they did not contain any openings. The room could be closed off from the pool with glass bifold doors. In that case, any person wishing to access the room could only do so by passing through the child resistant gate installed as part of the secure fencing around the pool and its surrounds. There was no barrier in place between the rumpus room and the pool. The Court ultimately found that there was no inconsistency with the condition of the planning consent and the building consent. That was because the Court determined that the condition was in fact being complied with (the development had already been constructed).

186 The Court reiterated that the decision in *Thorpe* was relevant only to the facts of that case and that each matter is to be determined on its own facts and applicable law.¹⁸⁹ Since *Thorpe*, the legislation with respect to swimming pool safety which applied at the time *Thorpe* was handed down, has been repealed. There is now a different legislative scheme in force under the Act and the SPS Regulations. The Building Code together with the relevant Australian Standards have all been amended. Counsel for the respondent took the Court through the changes that have been made to the standards since 2006 in some detail.¹⁹⁰

187 In *Thorpe*, the Court was not being asked to determine whether the relevant swimming pool safety features in place on the land complied with the provisions of the Building Code. In this case, that is precisely what the Court is required to do. This has involved the Court considering the provisions of the Building Code in detail together with the provisions of the Australian Standards. There was no detailed consideration of these matters in *Thorpe*.

188 Given these differences, the decision in *Thorpe* can be distinguished on its facts and this Court is not bound to follow it. Counsel for the appellant agreed¹⁹¹ and it is clear from the Council's communications with the appellant's legal representative that it also does not consider *Thorpe* to have any application to the facts of this case or the resolution of this appeal.¹⁹²

Conclusion

189 We have determined that the appellant has breached s 156 of the Act, that the Notice was clear and unambiguous in its terms and was a valid notice. The appeal is dismissed. We will hear the parties in relation to the revocation of the orders made on 27 May 2024 in addition to the question of costs.

¹⁸⁹ [2006] SAERDC 81, [27].

¹⁹⁰ T46-53.

¹⁹¹ T102 lines 29-38; T103 lines 1-24.

¹⁹² Exhibit R7, [20], and, at [49-[50].

ANY WINDOW AND DOOR OPENINGS (IF APPLICABLE) ARE RESTRICTED TO 100MM OR INSTALLED WITH APPROPRIATE BARRIER IN ACCORD WITH AS 1926.1

POOL FENCE/SAFETY BARRIER IS MIN. 1200MM IN HEIGHT BUILT IN ACCORD WITH AS 1926.1

— - Pool barrier line

Pump Station enclosed and over 5m from nearest dwelling.

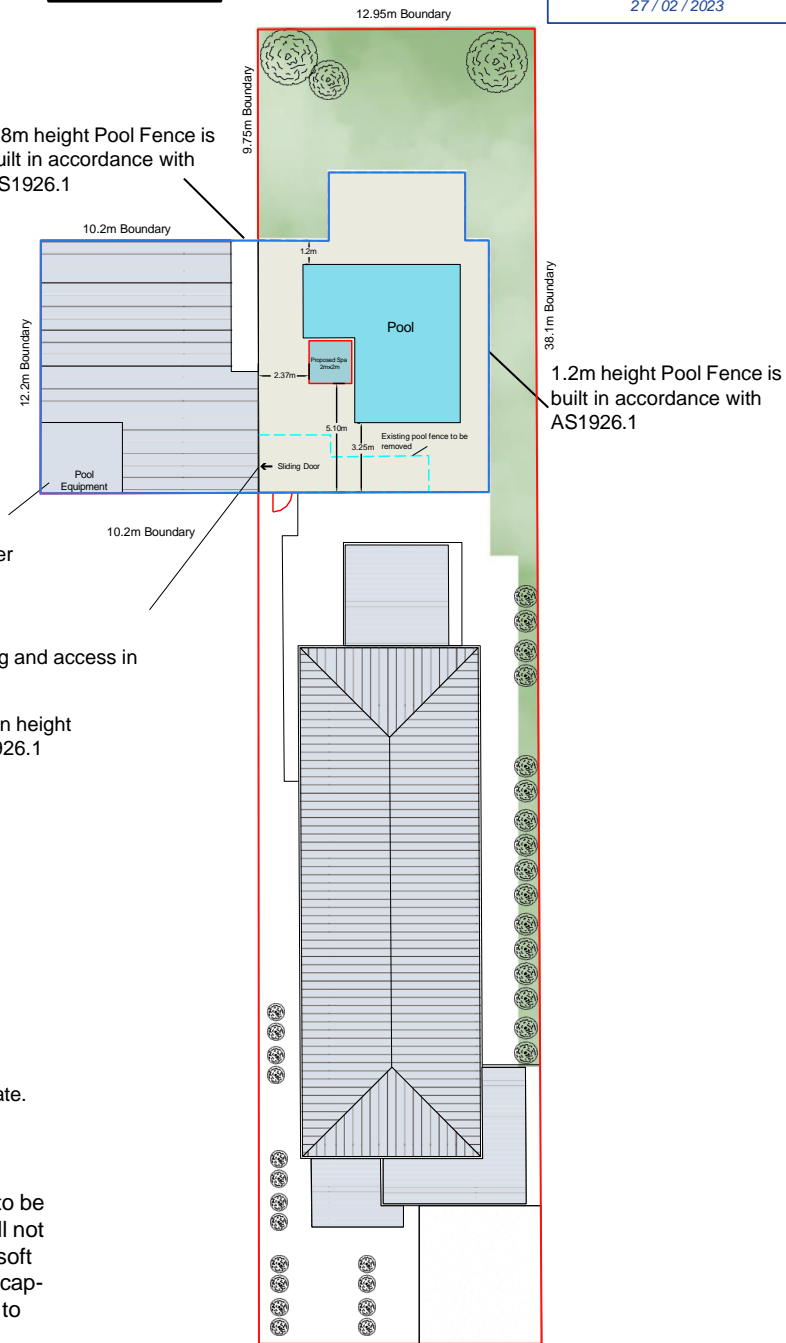
The sliding door is the only opening and access in the entertainment room.

Boundary barrier is min. 1800mm in height and built in accordance with AS 1926.1

A CPR sign must be either attached to the safety fence of the swim pool, or displayed near the swim pool.

*All measurements are approximate. Builder to confirm measurements on site.

The proposed development is to be built over concrete area and will not reduce the existing amount of soft landscaping on site. Soft landscaping percentage roughly equals to 17%.



30 Partridge Street, Glenelg



(m) 1 2 3 4 5 Scale 1:200