



**APPEAL**  
*Integrated Planning Act 1997*

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

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**Assessment Manager:** Matrix Certification Services

**Concurrence Agency:** Caloundra City Council

**Site Address:** *withheld*—‘the subject site’

**Applicant:** *withheld*

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### **Nature of Appeal**

Appeal against the decision of Matrix Certification Services to refuse a Building Development Application for an as constructed swimming pool based on a concurrence agency response for design and siting from Caloundra City Council dated 17 October 2007.

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**Date and Place of Hearing:** 10.00 am Tuesday 18 December 2007  
Offices of Caloundra City Council  
1 Omrah Avenue, Caloundra

**Tribunal:** Mr L F Blumkie Chairperson  
Mr Greg Schonfelder General Referee

**Present:** Applicant  
Applicant’s rear neighbour  
Mr Richard Prout Caloundra City Council Representative  
Mr Leo Blumkie Tribunal Chairperson  
Mr Greg Schonfelder General Referee

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### **Decision**

The Tribunal, in accordance with section 4.2.34 (2) (b) of the *Integrated Planning Act 1997* (IPA), **changes** the decision of Matrix Certification Services based on the concurrence agency response for design and siting by Caloundra City Council and **approves the siting variation subject to the following conditions:-**

1. The proposed deck, providing access to the pool, is reduced so as to be a minimum of 1500mm clear of the rear boundary;

2. The outside wall of the pool visible from the rear property is rendered;
3. A splash proof fence is:-
  - (a) positioned on the rear boundary line and is returned in from the rear boundary for a distance of 1500mm on both sides of the swimming pool;
  - (b) 1000mm above the coping;
  - (c) located so that the inside of the fence is flush with the inside of the pool so that there is no foot or toe hold available from the inside of the pool;
4. The outside of the splash proof fence is rendered to match the render on the wall of the pool as referred to under item 2;
5. The rear boundary on the right hand side of the pool is fenced to a maximum height of 1900mm above natural ground line, in materials to match the render to the wall and splash proof fence. The top of this wall is to be level i.e. there will be a step down where this fence adjoins the pool wall;
6. The remainder of the rear boundary to the left of the pool wall is fenced in materials to match the render to the wall and splash proof fence. The top of this fence is to be the same height as the fence on the right hand side of the pool wall;
7. The render to the pool wall, splash proof fence and fencing to the rear boundary are all matching colour approved by the Caloundra City Council;
8. Any future deck is to comply with the siting requirements;
9. No future structure including a class 10a is to be located within the 1500mm rear boundary clearance;
10. The pool fencing complies with the pool fencing legislation; and
11. The applicant demonstrates that the structure has been built clear of the council sewer main zone of influence and in accordance with Council's Sewer Main Protection Policy.

## **Background**

The property is a 751m<sup>2</sup> residential block, and is located in an Emerging Community Zone as per the Caloundra City Plan 2004.

An above-ground concrete swimming pool shell is sited on the rear boundary and is approximately 1800mm above natural ground surface.

A development application for a swimming pool on the subject property was made to a private certifier in April 2007.

The application had two addresses shown on the documents - namely *withheld* and *withheld*. The correct address is *withheld*

The application included:-

- detailed elevations of the pool, which clearly indicated it was some 1800mm above the natural ground on the rear boundary;
- a site plan which also indicated that side B was 1.8m above the ground; and
- a contour plan indicated the pool was above the ground.

The Private Certifier granted development approval for the pool on the 13 April 2007 with a condition on the site plan "Fence to be splash proof" arrowed to the rear boundary.

The applicant (Pool Builder) constructed the pool in accordance with the approved plans. It was noted the approved plans did not include the elevation drawing submitted with the application.

After the shell was constructed the owner contacted the Caloundra City Council to discuss the details of a splash proof fence. It was during that discussion that Council became aware that the pool was some 1800mm out of the ground and built on the rear boundary.

Council immediately verbally advised the owner that a pool built 1800mm above the ground on the boundary required a Council variation to be approved.

The owner passed on the advice to the certifier who immediately made an application for a siting variation to Council on the 4 October 2007. It is noted Part E of this application was worded "Pool is above-ground 1.8m high **within the front 6m setback**".

The application should have been worded that the "pool is **built on the rear boundary**" and is 1.8m above the natural ground line.

Council as the concurrence agency refused the application on 17 October 2007.

The Certifier as the agent of the applicant then made another application to Council on 1 November 2007 for a siting variation.

This was worded in Part E "Combined of pool and fence height".

Council verbally advised that this application would also be refused, and the certifier subsequently withdrew the application in order to receive a refund of the application fee.

The Certifier then amended the original decision notice and refused the application on 15 November 2007.

The reasons for refusal :-

1. The development does not comply with Performance Criteria Part 12 (Design and Siting Standards for single detached Housing on Lot 450m<sup>2</sup> and over) of the Queensland Development Code for the following reasons:-
  - a. The proposed structure will affect the privacy and amenity of the adjoining property;
  - b. The proposed structure will detract the outlook from the adjoining property;
  - c. There are no constraints on the allotment that prevent the proposed structure from being built with a complying setback of 1.5 metres.

An appeal was lodged with the Registrar on 21 November 2007.

### **Material Considered**

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

- 1 Pool Approval No. 1742 dated 13 April 2007.
- 2 Variation application dated 4 October 2007.
- 3 Concurrence Agency response dated 17 October 2007.
- 4 Variation application dated 1 November 2007.

- 5 Certifier's amended decision notice dated 15 November 2007.
- 6 'Form 10 – Notice of Appeal' lodged with the Registrar on 21 November 2007 including grounds for appeal and correspondence accompanying the appeal.
- 7 Photographs of the existing pool shell.
- 8 Written submission from Matrix Certification Services.
- 9 Verbal submissions from *withheld*.
- 10 Verbal submissions from *withheld*.
- 11 Verbal submissions from Mr Richard Prout.
- 12 Written Submission from Caloundra City Council dated 17 December 2007 provided at the hearing.
- 13 "Form 18 - Notice of Election" from Caloundra City Council.
- 14 Proposed subdivisional plan for the rear property.
- 15 Approved documents for the residence.
- 16 The *Building Act 1975* (BA).
- 17 The *Building Regulation 2006*.
- 18 The Queensland Development Code (QDC) Part 12.
- 19 The *Integrated Planning Act 1997*.
- 20 The Caloundra City Council planning scheme.

### **Findings of Fact**

The Certifier's written statement that "*The plans supplied by our client indicated the pool in the ground*" is incorrect, as the site plan, contour plan and elevation all submitted with the application, clearly indicate the pool is **1800mm above the ground** on the rear boundary.

The certifier issued a development approval on 13 April 2007 for a pool 1800mm above the natural ground line and located on the rear boundary line.

The pool builder erected the pool in accordance with the approved plans.

The pool shell is in conflict with Acceptable Solution A2 (a) of Part 12 of the QDC as the structure exceeds 1m in height and is within 1.5m of the rear boundary.

As the proposal exceeds the acceptable solutions the private certifier had no authority to issue the approval.

The development approval issued by the certifier is in contravention of Section 83 of the BA namely:-

*"The private certifier must not grant the building development approval applied for, if a concurrence agency has jurisdiction for part of building assessment work".*

The Caloundra City Council as the concurrence agency, only had authority to consider the siting variation proposal.

The variation application made by the certifier incorrectly referred to a pool **within the 6m front setback** and 1800mm above the ground. The pool is actually located on the rear boundary.

The pool shell, together with the splash proof fence, makes the total height of the structure on the rear boundary 2800mm high.

### **Reasons for the Decision**

The Caloundra City Plan makes no reference to siting requirements for swimming pools, hence the applicable code for assessment of the proposal is the QDC Part 12.

The following options were considered by the Tribunal:-

1. The pool could have been positioned 1500mm from the rear boundary and still maintained the 8m length. This would have had no effect on the clothes drying area as this is currently outside the proposed pool fence enclosure. The pool fence could have been relocated closer to the pool, which would have achieved a suitable play area outside the pool enclosure. (Recommended by the pool fencing standard).

This option would satisfied QDC Part 12 and would not have required a splash proof fence, nor a siting variation from Council.

Also, no fence would have been required on the boundary.

The opportunity for the owner to consider this option was lost because the certifier did not properly assess the proposal as a pool 1800mm out of the ground on the boundary.

In the opinion of the Tribunal, this option with no fence would achieve less privacy for both the owner of the subject property and the owner of the rear property.

2. A dividing wall possibly could have been positioned in the shell 1500mm in from the rear boundary. This would have shortened the useable pool length to 6.5m. Because the pool would have been 1500mm in from the rear boundary, no splash proof fence would have been required. i.e. possibly also less privacy.
3. Place conditions on the current design that improves privacy, adds to the aesthetics of the structures on the rear boundary, restricts future development within 1500mm of the rear boundary and still maintains an acceptable length pool for use by the owner.
4. Relocate the rear boundary to achieve a 1500 setback.

The Tribunal noted it was an as of right to erect a class 10a structure 9m long on the rear boundary with a mean height of 3.5m.

This, in the opinion of the Tribunal, would be less aesthetically acceptable and cause greater privacy problem than the proposal.

The Tribunal considered that:-

- The deck access to the pool could be reduced in length to be 1500mm from the rear boundary, thus reducing the bulk of the structure on the boundary.
- The splash proof fence could be positioned to align with the inside of the pool so that it was not possible to get a toe/foot hold and look over the fence from the pool side.
- The splash proof fence could be returned in line with the pool on both sides for distance of 1500mm.
- The pool shell could be rendered.
- The splash proof fence could be rendered to match the pool shell.
- The remainder of the rear boundary could be fenced up to a maximum of 1900mm with a rendered finish matching the pool shell and splash proof fence. The top of the additional fence should be level. This should achieve a step at the pool shell on both sides.
- The colour of the render should be to the satisfaction of Caloundra City Council.
- Any future deck should not be within the 1500mm rear boundary setback.
- No future class 10a structures should be permitted within the 1500 rear boundary setback.
- The pool fencing could be modified to accommodate the above changes and comply with the pool fencing legislation.

The tribunal considered the combination of these changes would achieve an acceptable:-

- level of privacy and amenity for the adjoining rear neighbour, and
- outlook from the adjoining rear property.

The adjoining neighbour who attended the hearing agreed with the proposed changes.

The Council representative accepted the proposed changes at the hearing.

With regard to the Council Sewer on the rear property, the applicant demonstrates that the structure has been built clear of the council sewer main zone of influence and in accordance with Council's Sewer Main Protection Policy.

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**Leo F Blumkie**  
**Building and Development Tribunal Chairperson**  
**Date: 8 January 2008**

## **Appeal Rights**

Section 4.1.37. of the IPA provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

- (a) of error or mistake in law on the part of the Tribunal or
- (b) that the Tribunal had no jurisdiction to make the decision or exceeded its jurisdiction in making the decision.

The appeal must be started within 20 business days after the day notice of the Tribunal's decision is given to the party.

## **Enquiries**

All correspondence should be addressed to:

The Registrar of Building and Development Tribunals  
Building Codes Queensland  
Department of Infrastructure and Planning  
PO Box 15009  
City East QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 3237 1248**