



Building and Development Tribunals

Queensland Government

Department of Local Government and Planning

APPEAL

Integrated Planning Act 1997

File No. 3-06-062

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Maroochy Shire Council

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

Applicant: *withheld*

Nature of Appeal

Appeal under section 4.2.13 of the *Integrated Planning Act 1997* against the decision of the Maroochy Shire Council to issue an Enforcement Notice in relation to Building Work being the construction of a deck, stairs, gazebo, spa and a fence. It is considered to be assessable development under Schedule 8, Part 1, Item 1 of the Act which has been constructed without a development permit for the building work and without a Council approval for the siting variation for this work; and

Appeal under section 21 of the *Standard Building Regulation 1993* against the decision of the Maroochy Shire Council to refuse in part an application for a variation to the siting provisions of the Maroochy Shire Town Planning Scheme (Application No SBR06/0048) for the location of:

A Class 10b deck, gazebo and spa (being over 1.0m in height) within the rear boundary setback of 4.5m at “the subject site”.

Date and Place of Hearing: 9.00am on Wednesday, 2 August 2006.
On site at “the subject site”.

Tribunal: Gregory Schonfelder

Present: Applicant (Builder)
Steven Tucker – Maroochy Shire Council
Neighbour

Decision

I determine that:

1. the requirements of the Enforcement Notice issued on 28 June 2006 be modified to align with the amended decision notice to be issued for the application for siting variation.
2. the requirements of the Siting Variation Advice to refuse in part and approve in part the (Application No.SBR05/0144) for the siting of a Class 10b Deck, Steps, Gazebo, Boundary Fence and Spa within the 4.5m of the north boundary (canal) of the property are set aside and the following conditions shall apply:

Approval

- The proposal for the siting of gazebo as shown on the submitted drawings with a setback of 3.50m in lieu of 4.5m from the outermost projection to the rear boundary (canal) is approved.
- The proposal for the siting of the timber deck as shown on the submitted drawings to the north of the gazebo at a height of approximately 1.5m above the lower deck and with a 1.0m balustrade with a setback of approximately 1.8m in lieu of 4.5m is approved.
- The proposal for the siting of the timber access steps which join the lower deck to the upper deck at a height of approximately 1.5m above the lower deck and with a 1.0m balustrade with is approved subject to them being rotated 90 degrees and moved so that they start in line from the base of the upper deck and ascend the slope.

Refusal

- The proposal for the siting of the timber deck located in the north east corner of the property at a height exceeding 1.0m above natural ground level within 4.5m of the rear boundary (canal) is refused.
- The proposal for the siting of the glass fibre spa which is located in the deck in the north east corner of the property at a height exceeding 1.0m above natural ground within 4.5m from the rear boundary (canal) is refused.
- The proposal for the siting of the boundary fence (dividing fence on the east side of the property) exceeding 1.0m above natural ground level within 4.5m of the rear boundary (canal) is refused.

Note:

These requirements can be put into the standard Maroochy Shire Council decision notice format.

An amended plan with the changes shown is attached.

Background

The applicant explained the basis for his original application to Council for a siting variation and the basis for their appeal in that:

- He was not aware of the Council requirement for structures to be less than 1.0m in height within 4.5m from the rear boundary.
- There are several similar structures in the surrounding area, within the rear setback (canal) and similar design.
- Stainless wire balustrade has been used on the deck walkway to reduce impact and allow visual sightlines to remain.
- The spa and deck or the main deck cannot be lowered because of the rock foundations which would make excavations difficult.
- Boundary fence has been constructed at that height to maintain privacy for both the owners and the neighbour.
- Existing pergola has been removed and replaced with a deck.
- The Builder was not aware of the natural ground level and accepted in good faith the existing level as being the original natural ground level.
- He is aware that no Building Approval exists for the deck, fence and spa.

The Council's representatives responded to their refusal in that:

- The building work has been constructed without approval (building approval and a siting variation) and does not comply with and can not be conditioned to comply with the following performance criteria P4 of the Maroochy Shire Council Planning Scheme: Buildings and structures must not cause significant loss of amenity to adjacent land and dwellings having regard to: overshadowing, privacy and overlooking, views and vistas, building character and appearance, and building massing and scale as seen from adjoining properties.
- Council has great concerns regarding the positioning of structures at the rear of lots which do not allow for landscaping along the common (side) boundary.
- In assessing this application the Council Officer considered the development has resulted in a significant negative impact on the adjoining property's privacy due to overlooking and has resulted in a significant restriction of views and vistas.
- It is in conflict with the setback performance criteria and the acceptable solution of 1.0m in height within the 4.5m rear setback from the rear boundary (canal).
- When considering applications for structures within the 4.5m setback the preference is that these are of light construction which do not impact on views and privacy. The pergola was approved at 3.5m from the rear boundary because it was an open structure and setback at a considerable distance from the side boundary.
- They also pointed out that there may be other structures on adjoining properties within the 4.5m setback built without approvals.
- Council considers that there is a distinctive and consistent setback of the structures from the rear boundary (canal) within the local environment and the location of the deck, spa and fence will likely generate adverse amenity impacts on the local environment.
- The landscaping retaining walls appear not to be original or built with the required approvals.

- Precedent is also a factor why Council does not support the applicant's proposal. The approval of these proposals results in an eroding of the areas amenity and ultimately the intent of the Code for Residential Development and Use within the Maroochy Plan 2000

“*Withheld*” (neighbour) provided the following:

- He has owned the adjoining property for approximately 5 years and the main reason for purchasing this property was the strict covenants which the developer Lend lease advertised in their sales brochure.
- He has had complaints from his tenants regarding lose of privacy
- He has had confirmation from an estate agent that the structure on the adjoining property had devalued his property.
- He had not been approached by the owner prior to the work starting and the boundary fence being removed.
- He believes the action of the neighbour in constructing these structures has had the following effect:

Non compliance with the Maroochy Shire Council procedures in obtaining approval prior to building.

A disregard and a breach of the Lend Lease covenant and building requirements where the rear and side fence between the building line and the lake edge should be 1,2m in height and constructed of black powder coated metal vertical rods with flat black capping. Any building or development on the battered slopes should also be limited to light flexible structures, Construction of substantial structures should not be approved. Benches and terraces on batters shall not exceed 1.0m in height. The privacy of the neighbour's living/entertainment areas should be considered.

A disregard for the adjoining owners through the unauthorised removal of the boundary fence and the building of a structure which creates an invasion of privacy, an eye sore and the loss of views and vista from his property. This wall removes the character set by the covenants and therefore devalues the property.

Material Considered

1. Siting Variation Advice from the Maroochy Shire Council dated 9 June 2006 to approve in part and refuse in part to refuse the application for (Application No SBR06/0048) for the siting of a deck, gazebo, spa and fence within 4.5m of the rear boundary (canal) setback;
2. Building and Development Tribunal Appeal Notice dated 9 June 2006 from the applicant;
3. Enforcement Notice from the Maroochy Shire Council dated 28 June 2006 to the “*applicant*” regarding building work (deck ,stairs, gazebo, spa and fence being built with out the required approvals and instructing them to demolish and remove the illegal structures and obtain development approval for the pool fence and gazebo;

4. Letter dated 20 July 2006 and copies of plans of the building work from Suncoast Building Approvals;
5. Statement and associated documents (Real estate agents estimate of loss of value, statutory declarations from the tenants of No 5 regarding loss of amenity and lack of contact regarding the building work, Lend lease estate design guidelines) submitted at the hearing;
6. The *Standard Building Regulation 1993*; and
7. The *Integrated Planning Act 1997*.

Findings of Fact

1. The building work being the deck, stairs, gazebo, spa and fence has been constructed without the required development approvals (building).
2. The building work does not comply with performance criteria P4 of the Maroochy Shire Council Planning Scheme where any building or structure within 4.5m of the rear boundary (canal) can not exceed 1.0m in height.
3. An application was made to Council for a siting variation for these building works and in their decision dated 9 June 2006, the gazebo was approved but the deck, stairs, and fence were refused.
4. The building works which have been constructed and are subject of this appeal include:
Boundary fence (east) The rendered fibre cement board fence has been extended from the end of the existing pool to the intersection with the canal. From the drawings provided the height of the fence above ground appears to be from approximately 2.0m (south) to 2.70m (canal).
Timber deck constructed in the north east corner of the property to a maximum height of 1.5m at the intersection of the property boundary with the canal wall.
Glass fibre outdoor spa which has be inserted into the timber deck
Gazebo approximately 4.5m square and 4.5m in height constructed between the swimming pool and the dwelling.
Deck to the canal side of the gazebo approximately 1.5m above the lower timber deck along the canal wall.
Steps leading from the lower timber deck to the upper deck, which contains the spa.
5. From the inspection and the submitted documentation the surrounding properties are similar in size, development types, landscaping and appear to have similar setbacks to the dwelling from the road boundary and the rear boundary (canal).

Reasons for the Decision

The construction of the deck (including the spa) and the boundary fence has resulted in a significant loss of amenity to the adjacent land and the dwelling to the south. The deck being constructed to both the adjoining boundary fence line and the canal boundary at a height of approximately 1.5m above natural ground has severely affected the privacy by overlooking of the adjoining property.

The requirement to ensure adequate pool fencing is installed and maintained is of the utmost importance.

The construction of the deck along the canal frontage has intensified the building massing and scale in this area, which can impact, on the adjacent properties.

The intent of the Code for Residential Development and Use within the Maroochy Plan 2000 in this area is to minimise the construction of buildings and structures within the 4.5m setback from the rear boundary (canal).

The problem of precedent needs to be considered with any decision to allow development within the required canal boundary setback.

The decision to allow the main deck to remain has been taken on the basis that the sight lines (views and vistas) and privacy to adjoining properties is considered reasonable and not considered a significant change to the existing conditions. The removal of the deck, spa and fence was considered necessary to meet the objectives of the planning provisions for this area.

Gregory Schonfelder
Building and Development
Tribunal Referee
Date: 21 August 2006

Appeal Rights

Section 4.1.37. of the *Integrated Planning Act 1997* provides that a party to a proceeding decided by a Tribunal may appeal to the Planning and Environment Court against the Tribunal's decision, but only on the ground:

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

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

Enquires

All correspondence should be addressed to:

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