



**Building and Development Tribunals**

**Queensland Government**

Department of **Local Government and Planning**

**APPEAL**

*Integrated Planning Act 1997*

**File No. 3-05-032**

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

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**Assessment Manager:** Noosa Shire Council

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

**Applicant:** *withheld*

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### **Nature of Appeal**

Appeal under section 22(2) of the *Building Act 1975* against the decision of the Noosa Shire Council to refuse the application for a variation of the Queensland Development Code, Part 12 to allow the existing Class 10a Garage, Landings and Stairs and Class10b Retaining Wall/Fence to remain in their “as built” location along the southern boundary of the site, exceeding the maximum allowable height above natural ground on land described as Lot *withheld* situated at “the subject site”.

The Applicant advised that she is not appealing items 4 & 5 of the Council’s letter of refusal being the proposed 2.2m to 2.6m high timber fence along the southern boundary and the 3.4m high bamboo fence along the western boundary.

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**Date and Place of Hearing:** 1.00pm on Wednesday 6 July 2005.

On site at “the subject site”.

**Tribunal:** Gregory Schonfelder

**Present:** *withheld*, Applicant and Owner of the land  
*withheld*, Owner of the land  
Steve Leece, Country Coastal Certifiers, Owners Representative  
Phil Quayle, PQ Architects, Owners Representative  
Benjamin Lebeter, Sun City Homes, Owners Representative  
Greg Jorgensen, Noosa Shire Council  
*withheld*, Neighbour  
*withheld*, Neighbour

**Decision**

I determine that the decision to refuse the application for a siting variation issued by the Noosa Shire Council dated 13 May 2005 to allow the existing Class 10a Garage and Class 10b Retaining Wall/Fence remain in their current location on the property at “the subject site” is **set aside** and approval is granted for:-

- (i) the siting of the existing Class 10a Garage within the 1.5m standard side boundary setback (southern boundary) observing a mean height of 4.05m in lieu of 3.5m.
- (ii) The siting of the existing Class 10b Retaining Wall/Fence along the southern boundary as shown on survey plan (Jones Flint & Pike, Drawing Number M1584-02a)
- (iii) The balance of the southern boundary which was proposed to be a timber screen fence between 2.2m and 2.6m in height could be constructed (in timber or masonry construction) subject to the adjoining owners consideration, but now only 2.2m to 2.4m (2.4m being the new reduced maximum height of the existing masonry fence)

Subject to:

- (i) A Development Approval being obtained for the Class 10b Retaining Wall/Fence or the existing Development Approval is modified to include this structure.
- (ii) The height of the Retaining Wall/Fence along the southern boundary is to be reduced in accordance with the following requirements. The length of the fence shall be divided into three equal sections. The western section currently 2.6m above natural ground level shall be reduced to 2.4m (one block removed). The middle section currently 2.6m to 2.4m in height shall be reduced to 2.2m (part 2 blocks and part one block removed). The eastern section currently 2.2m in height shall be reduced to 2.0m (one block removed). The south side of this wall/fence shall be rendered to provide a similar finish to the dwelling.
- (iii) The landing and stairway to the rear of the garage shall be provided with a privacy screen (1.6m in height, 50% transparent) along the side adjacent to the boundary when more than 1.0m above natural ground level.

### **Background**

The applicant explained the basis for the application to the Council for a variation to the siting of the proposed garage, landing, stairs and retaining wall/fence and the subsequent appeal against Councils' decision to refuse this application:-

- The lower level of the dwelling/garage was designed to be on the one level (no steps) and this is why the garage ended up being higher than planned because the northern end of the dwelling was not excavated to the correct level.

The owner's representatives stated:-

- Streetscape – The bulk of the building/structure does not have an adverse effect on the streetscape due to the nature of the site being on a sweeping bend and consistent with similar dwellings in the area. The outlook and views of the neighbouring residents are not affected by the height of the garage wall and by setting back the wall further from the boundary the outlook and views would not change. Because the neighbour's yard has been excavated approximately 800mm the effect of the garage and wall appears more imposing than if the sites were level.
- Light and Ventilation – The garage wall is permitted to be constructed up to the side boundary as of right and this has no effect on the light and ventilation of the habitable rooms in the adjoining dwelling. The adjoining dwelling is setback approximately 8.0m from the side boundary and is not affected by the proposal.
- Visual Privacy – The neighbouring property is not affected by the garage wall as there are no openings along its length. The stairs from the garage will only be used intermittently. The height of the landing is only 300mm above 1.0m and is part of the garage not the dwelling so is allowed to be located within the boundary setback.
- Siting Variation – Dwelling. The nature of the site restricted the object of having a level ground floor and the builder raised the level on the south side (Garage) approximately 680mm to facilitate this requirement. The flow on effect of this change was that the garage wall mean height was increased to 4.05m being 550mm above the permitted mean height of 3.5m.
- Siting Variation – Block Fence. The height of the block fence was raised to 2.6m to provide some privacy to the adjoining neighbour. This height will also ensure car headlights do not shine directly into the neighbours dwelling. The excavation on the adjoining property has exacerbated the height of this wall.

The Council's representative in his response stated:-

- The application for siting variation was instigated from a complaint.
- The building was raised approximately 680mm by the builder which was contrary to the approved plans.
- The Private Building Certifier should have identified the issue at the footing/slab inspection stage and addressed the issue, by either raising the issue with the builder and reducing the building height, or stopping work until a siting variation could be considered.
- Noosa Shire Council was placed in the position of having to assess an existing garage structure and block fence retrospectively.
- The garage height being over the maximum mean height has an impact on the outlook of the adjoining property. Especially considering the adjoining land has been excavated.
- The Council concedes that the garage could have been built to the side boundary in

accordance with QDC Part 12, the effect on light and ventilation to the adjoining properties habitable rooms is minimal, and some privacy screening to the stair landing could alleviate the overlooking of the adjoining property.

The Adjoining Owner's in their response stated:-

- The position of the garage does not appear to comply with the siting requirements of the Standard Building Regulation. The building now casts a shadow over and overlooks the pool and deck area which limits the use of this area. Also during heavy rain the gutters are insufficient to catch the roof water and this causes a nuisance to their property.
- The retaining wall/fence overshadows the pool, towers above the existing fence and is unfinished on their side.
- The size and bulk of the house and fence have impacted greatly on their privacy and the amenity of the area.
- They have concerns with the structural adequacy of the building and the fence and the effect this will have on the pool, retaining wall and deck.
- Subsequent to the appeal hearing the adjoining owners advised they believe that if the wall should continue along the boundary it would probably benefit both parties.

#### **Material Considered**

1. Document: Copy of Application for Siting Variation including plans.  
From: The Certification Professionals (Gregory Roberts)  
To: Noosa Shire Council  
Dated: 23 March 2005  
Detail: Application to vary siting of the existing Class 10a Garage, landing and stairs and along the southern boundary of the site exceeding the maximum allowable height above natural ground.
2. Document: Copy of Letter of Refusal  
From: Noosa Shire Council  
To: The Certification Professionals  
Dated: 13 May 2005  
Detail: In this letter the Noosa Shire Council refused of the application for siting variation for the Garage, Landing and Stairs, Masonry Fence (southern boundary), Timber Fence (southern Boundary) and Bamboo Fence (western boundary).
3. Document: Copy of Appeal Notice – Form 10  
From: *Applicant*  
To: Register, Building and Development Tribunal  
Dated: 25 Many 2005  
Detail: Appealing the decision of the Council to refuse the application for siting variation and providing some basis for this appeal.
4. Document: Copy of Appeal supporting documentation

From: *Applicant*

To: Register, Building and Development Tribunal.

Dated: June 2005

Detail: Documented supporting information, Seven A4 colour photographs, Architects sketch plan showing solar angles and annotated detail plans, Elevation and section showing mean wall height, Survey Plans M1584-01 & M1584-2a.

5. Document: Objection to the Appeal supporting documentation

From: *Neighbours*

To: Register, Building and Development Tribunal

Dated: 30 June 2005 (faxed copy to Referee 6 July 2005)

Details: Documented information objecting to the proposal, Copies of correspondence to the Noosa Shire Council regarding the neighbouring building/structure (17/1, 22/2, 17/3/05), Copy of response from the Noosa Shire Council 1 April 2005, Copies of various emails between Noosa Shire Council and Solicitors acting for *neighbours*, Copy of neighbours statement to Noosa Shire Council 4 May 2005, Copy of Engineer's assessment (commissioned by *neighbours*) of the structural adequacy of the neighbouring building and structure with drawing.

6. Document: Copy of Noosa Shire Council's response to the Appeal

From: Greg Jorgensen

To: Referee, Building and Development Tribunal

Dated: 6 July 2005

Details: Documented further the basis for refusing the Application for siting variation.

7. Document: Copy of Letter and sun/shadow diagrams.

From: Phil Quade, PQ Architects

To: Referee, Building and Development Tribunal

Dated: 12 July 2005

Details: Sun/shadow diagrams at 9.00am, 12 noon, and 3.00pm for the as approved and the as constructed situations.

8. Standard Building Regulation 1993 including Queensland Development Code Part 12

9. The Integrated Planning Act 1997

### **Findings of Fact**

I made the following findings of fact:

1. The Class 10a garage has been constructed within the 1.5m side boundary (southern boundary) setback prescribed under the Queensland Development Code, Part 12 with a mean height of 4.05m in lieu of the prescribed height above natural ground level of 3.50m.
2. The Class 10b Retaining Wall/Fence has been constructed along the southern boundary within the 1.5m side boundary setback with a height at its highest point of 2.6m in lieu of the prescribed 2.0m.
3. An application to the Noosa Shire Council to vary the siting requirements to allow the

Class 10a Garage and Class 10b retaining Wall/Fence to remain as constructed has been considered and refused.

4. The endorsed plans of the Building Approval issued by The Certification Professionals show a finished floor height in the garage of 29.4m where the “as constructed” floor height is 30.08m.
5. Under section 20 of the Standard Building Regulation, the Noosa Shire Council may vary the acceptable solutions in the Queensland Development Code, Part 12, (Design and Siting Standard for single detached housing) if it considers that such variation complies with the relevant performance criterion mentioned in QDC, Part 12. The opinion of the Tribunal, in satisfying the Performance Criteria is documented as follows:

**P1 Buildings and structures**

The location of a building or structure facilitates an acceptable streetscape, appropriate for-

- (a) the bulk of the building or structure; and
- (b) the road boundary setbacks of the neighbouring buildings or structure; and
- (c) the outlook and views of the neighbouring residents; and
- (d) nuisance and safety to the public.

**Complies** - The house and fence has been architecturally designed to compliment the adjoining properties and the streetscape. The road boundary setback complies with Part 14 for the dwelling and with the changes made to the fence height the impact on the streetscape is reduced. The views from the adjoining property are predominantly to the south and west and not up hill over the subject property. The construction of the dwelling and allowable height fence restricts any view from the neighbouring property especially with that property being excavated. The development would not appear to create a nuisance or jeopardise safety issues for the public.

**P2 Buildings and structures**

- (a) provide adequate daylight and ventilation to habitable rooms; and
- (b) allow adequate light and ventilation to habitable rooms of buildings on adjoining lots.

**Complies** (a) & (b) The light and ventilation are not affected by the amended siting of the dwelling and fence. The siting of the dwelling and fence (with the conditions imposed) would not affect the light and ventilation to habitable rooms in the building on the adjoining property.

**P3 Adequate open space is provided for recreation, service facilities and landscaping.**

**Complies**

**P4 the height of a building is not to unduly –**

- (a) overshadow adjoining houses; and
- (b) obstruct the outlook from adjoining lots.

- (a) **Complies** – The garage and the fence does not overshadow the adjoining house.
- (b) **Complies** – The adjoining house has been constructed at angle to the street and it appears to be sited to take advantage of the views to the south. This outlook is not affected and as the site has been excavated any building constructed on the subject site and the allowed

fencing height to the boundaries would obstruct the outlook to the north.

Note: There is some overshadowing from the increased height of the garage and the fence on the neighbouring property especially the pool and deck area. The additional architectural drawings requested which show the approved and as constructed sun/shadow effects of the dwelling and fence show longer shadows in the afternoons in winter. A two-storey dwelling at the required setback of 2.0m to the outer most projection would have a greater effect on the adjoining property.

P5 Buildings are to be sited and designed to provide adequate visual privacy for neighbours.

**Complies** – The garage does not have any windows facing the adjoining property and is only a single storey construction.

P6 The location of a building or structure facilitates normal building maintenance.

**Complies** – The wall of the garage is set-back from the side boundary which will enable access for building maintenance.

P7 The size and location of structures on corner sites provide for adequate sight lines.

N/A

P8 Sufficient space for on-site car parking to satisfy the projected needs of residents and visitors, appropriate for –

- (a) the availability of public transport; and
- (b) the availability of on-street parking; and
- (c) the desirability on-street parking in respect to the streetscape; and
- (d) the residents likelihood to have or need a vehicle.

Complies – Parking provided for 4 vehicles off street.

### **Reasons for the Decision/Comments**

An assessment under section 20 of the Standard Building Regulation indicates that, subject to the conditions imposed, the siting requirements of the Queensland Development Code, Part 12 may be varied to allow the garage and the retaining wall/fence (subject to conditions) to remain in the existing location.

The garage and the retaining wall/fence (subject to conditions) because of the construction, materials used, design and proposed colour does not unduly impact on the streetscape or adjoining properties.

The Tribunal decision in this case to allow the building and structure to remain does not condone the practice of illegal building work and subsequent applications to formalise the situation.

The Building Certifier should investigate the issue of structural adequacy of the dwelling and retaining wall/fence on the subject property in light of the Engineer's report commissioned by the adjoining owner. As the retaining wall/fence is over 2.0m in height the Building Approval needs amending to allow for this construction to remain in its reduced form. The Tribunal only has jurisdiction to consider the requirements of the Queensland Development Code, Part 12, the purpose of which is to provide good residential design that promotes the efficient use of a lot, an acceptable amenity to residents, and to facilitate off-street parking. The aspects of structural adequacy and the impacts of applied loadings on adjoining properties are the responsibility of the Building Certifier and the Council.

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**Gregory Schonfelder**  
**Building and Development**  
**Tribunal Referee**  
**Date: 28 July 2005**





## **Appeal Rights**

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

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

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

## **Enquiries**

All correspondence should be addressed to:

The Registrar of Building and Development Tribunals  
Building Codes Queensland  
Department of Local Government and Planning  
PO Box 31  
BRISBANE ALBERT STREET QLD 4002  
**Telephone (07) 3237 0403: Facsimile (07) 32371248**