



APPEAL
Integrated Planning Act 1997

File No. 3/02/034

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Maroochy Shire Council

Site Address: 3 St Ives Terrace, Buderim

Nature of Appeal

Appeal under Section 4.2.9 of the Integrated Planning Act 1997 against the decision of the Maroochy Shire Council to refuse an application for a relaxation of the road boundary clearance required to enable the construction of a gazebo within the front six metres of a property described as Lot 11 RP 855780, situated at 3 St Ives Terrace, Buderim.

Date and Place of Hearing: 4.30 pm on 19 August 2002
at 3 St Ives Tce, Buderim

Tribunal: Geoff Cornish

Present: Applicants
Brett England – Maroochy Shire Council
Kay Johns – for applicant's builder

Decision

In accordance with Section 4.2.34 [2] of the Integrated Planning Act 1997, I hereby set aside the decision appealed against and grant a siting concession to enable a gazebo to be erected within 6 metres of the road boundary of the property described as Lot 11 RP 855780, situated at 3 St Ives Terrace, Buderim, subject to the following conditions :-

1. The plan area of the gazebo shall not exceed that of the existing structure.
2. The plan location on the property shall be as for the existing structure.
3. The uppermost point of the structure shall not exceed the Council approved concessional level of the top of the adjacent front fence.

Background

The matter concerns an application for a concession to enable the validation of the erection of an unapproved gazebo adjacent to a swimming pool constructed within the front boundary setback of this property. Erection of the gazebo was undertaken without either a siting approval or a development approval for building work. The owners and their builder were not aware that these approvals were necessary in order to undertake the work lawfully. The matter came to Council's attention as the result of a complaint lodged by an unidentified neighbour.

After commencement of an investigation by Council, an application was made to Council for a Development Permit and a siting variation to enable the gazebo to be constructed within the front boundary setback of the property. This application was refused and that decision has been appealed.

Maroochy Plan 2000, before recent amendments, made reference to the siting of dwellings and outbuildings in Code 4 of the Plan. It called up the siting provisions of Part 3 of the Standard Building Regulation 1993 (SBR), with the exception of the provisions of Section 37, as being acceptable measures for any assessment of compliance with the Plan requirements for such structures.

There are, however, questions as to the jurisdiction of a Building & Development Tribunal to determine such an appeal and this matter is addressed as follows.

- a) The development approval applied for was for building work.
- b) Building work is a matter under the Integrated Planning Act that relates to the Building Act 1975.
- c) Section 4.2.7 of the Integrated Planning Act prescribes the rights of appeal to a Tribunal and limits those rights to only that part of a development application assessed against the Building Act 1975.
- d) The investigation of this matter commenced before amendments to Maroochy Plan 2000 took effect.
- e) Maroochy Plan 2000 stated that the provisions of the Standard Building Regulation (SBR) would apply as "acceptable measures" where relevant in the Council's "Code for Residential Development and Use", except for the provisions in Section 37.
- f) Section 48 sets out the process for assessing an application to vary the provisions of Division 2 of Part 3 of the SBR.
- g) The assessment carried out by Maroochy Shire Council was consistent with an assessment against the "acceptable measures" listed in Section 48(3) of the SBR.
- h) The Tribunal's jurisdiction is limited to a review of the Council's assessment of the original application against those "acceptable measures", and excludes any consideration of matters involving impact assessment under Maroochy Plan 2000.
- i) As the development application was for building work and the siting assessment was made against provisions of the Building Act 1975 called up in the Plan, the jurisdiction of the Tribunal to hear the matter is as defined in Section 4.2.7(2)(a) of the Integrated Planning Act.

I am therefore of the view that this Tribunal has jurisdiction to conduct the hearing of this appeal.

Further to the above assessment, Maroochy Council indicated its acceptance of the Tribunal's jurisdiction in this matter, based on the fact that consideration of this matter commenced before amendment of Maroochy Plan 2000.

Material Considered

1. Letter from the applicant's consulting engineer, dated 22 March 2002 submitting supporting information for the concessions and approvals sought.
2. Council's letter of 22 July 2002, approving in part and refusing in part the application for development approval for a swimming pool and concessions in relation to the siting of the gazebo and the height of a proposed front fence, and setting out reasons for the refusal.
3. Building and Development Tribunals Appeal Notice dated 30 July 2002.
4. Verbal submission by the applicant on 19 August 2002 setting out why the application should have been granted and the appeal should be allowed.
5. A written submission from the applicant dated 19 August 2002 and setting out the matters raised in item 4 above.
6. Verbal submission by Brett England of Maroochy Shire Council on 19 August 2002 setting out Council's reasons for refusal.
7. Standard Building Regulation 1993.
8. Building Act 1975.
9. Integrated Planning Act 1997.

Findings of Fact

I made the following findings of fact:

1. The gazebo was erected without the approval of a siting variation or the issuing of a Development Permit for building work.
2. Both of the above approvals were necessary for the lawful erection of the structure.
3. The matter came to the attention of the Council as the consequence of an anonymous complaint lodged by a neighbour.
4. Investigation of the matter commenced before changes to Maroochy Plan 2000 took effect.
5. The siting provisions of the Standard Building Regulation were defined in Maroochy Plan 2000 as "acceptable measures" for an assessment of siting compliance in its "Code for Residential Development and Use".
6. The siting of the gazebo was not consistent with the provisions of Division 2 of Part 3 of the Standard Building Regulation, in particular the provisions of Section 42(c).

7. The provisions of Section 48 included in the Code may be used to determine how the application of Division 2 of Part 3 of the Standard Building Regulation may be varied.
8. The assessment of the application, with respect to the siting of the gazebo, was made having regard to the provisions of Section 48 of the Standard Building Regulation, as set out in the Decision Notice of 22 July 2002.
9. Concessions have been granted by Council in respect of the location of the adjacent swimming pool and the height of the front fence of the property.
10. The gazebo is to be used in conjunction with the pool to provide a shady place in close proximity to the pool from which the applicants can supervise their young children.
11. A large covered verandah exists at the front of the dwelling adjacent to the pool, however the applicants prefer not to utilise this shaded area due to its greater exposure to the street, decreased accessibility to the pool and increased cost.
12. The gazebo is sited at existing ground level and not at a level commensurate with that of the pool.
13. The gazebo stands at an overall height that exceeds that of the adjacent fencing by approximately 1 metre.
14. The adjacent fence has been granted a concession to exceed the height normally permitted for such structures.
15. The projection of the gazebo roof above the level of the front fence increases the effect of the fence upon the streetscape and its visibility to neighbours.
16. A gazebo constructed at a level commensurate with that of the pool, with the roof not projecting above the approved level of the front fence, would not be visible from the street. There would be no increase in the effect upon the streetscape from such a structure.
17. A structure not affecting the streetscape should comply with the requirements of Section 48 as an acceptable method of varying the provisions of Section 42(c).
18. The pre-existence of the gazebo is not a matter required by Section 48 to be considered in an assessment of the appropriateness of granting a siting concession for the structure.
19. The gazebo, as erected, is not capable of modification due to the nature of its design and construction.
20. Licensed builders are required to be conversant with, and abide by, building law.
21. The Tribunal has jurisdiction to hear the appeal.

Reasons for the Decision

After assessing the facts and the submissions of the parties, I have reached the following conclusions:

1. Given the concession granted by the Council in respect of the increased height of the front fence and its effect upon the streetscape, the approval of a gazebo that did not project above the level of the fence, and hence did not increase the effect of that fence, would satisfy the requirements of Section 48 of the Standard Building Regulation for a variation of the provisions of Section 42 (c).
2. A lowering of the siting level of the gazebo would achieve the aims of Conclusion 1 above. It would also increase the level of privacy for the applicants and lessen the effect upon the outlook of any neighbours.
3. If this concession had been sought before construction of the gazebo, as required by the Standard Building Regulation, there would be no problem resulting from the inflexibility of the structure to accept modification.
4. The applicants and their builder each had a legal responsibility to seek the necessary approvals prior to erection of the structure.
5. The existence of the structure and its inflexibility to alteration should not be made the basis for determination of the grounds upon which any approval should be granted. To do so would encourage persons to construct first and seek approval afterwards.
6. The applicants should be given the opportunity to have a suitable structure sited so as to be consistent with Conclusions 1 and 2 above.
7. The applicants may have some contractual ability to cause their builder to reconstruct at an approved level.

G.S.Cornish
Building and Development
Tribunal Referee
Date: 3 September 2002

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:

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