



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number: 3—09-076

Applicant / Appellant: Mick Antoniou

Assessment Manager / Respondent: Gladstone Regional Council (Calliope Office)

Concurrence Agency / Co-Respondent: Gladstone Regional Council

Site Address: 4 Stoney Court, Tannum Sands, and described as Lot 105 on SP152424, Parish of Inveragh — the subject site

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision, dated 23 September 2009, of Gladstone Regional Council to refuse an application relating to an existing class 10a building structure (retaining wall) to be constructed greater than the allowable height on the subject site.

Date of hearing: 11.00 am — Tuesday, 17 November 2009

Place of hearing: The subject site

Tribunal: Georgina J Rogers — Chair

Present: Mick Antoniou — Applicant
Ray Andrews — Assessment Officer, Gladstone Regional Council (Calliope Office)

Decision:

The Tribunal, in accordance with section 4.2.34 (2)(c) of IPA **sets aside** the decision appealed against to refuse the development application for building works, namely a class 10b structure (retaining wall) greater than 2.0m in height constructed along the front and side boundary alignments.

The Tribunal **directs** the Gladstone Regional Council to approve the development application subject to the following conditions:-

1. The existing structure (retaining wall) and associated fencing is not to exceed a combined height of 2.8m at any point along the perimeter of the site.
2. The fencing in the location of the proposed swimming pool is to comply with current legislation in relation to construction type.
3. The 600mm high pier projecting above the retaining wall/fence on the north-east corner of the site is to be removed and the future fence to be located back from the corner by a minimum of 2.5m. The corner of the site is to be landscaped and maintained.

4. The retaining wall and fence are to be rendered and coloured to blend with the character of the neighbourhood and future dwelling.

Background

An on-site hearing was held which was attended by the appellant and a representative of the Gladstone Regional Council. The Tribunal observed that the neighbourhood has very low traffic volume and is a small community which has been recently developed with substantially sized new residential dwellings, and is surrounded by an established neighbourhood.

The site is a rectangular lot fronting east to Stoney Court and is located beside a corner lot which is to the north. The lot rises steeply from the north-east front corner to the rear south-west corner. It would appear that the site has a cross fall in excess of 3.0m, possibly 4.0m. The impact of the existing retaining wall with proposed fence on top is evident when turning into the street. The retaining wall is reinforced grey concrete blockwork. The retaining wall has been constructed for practical purposes to enable a dwelling suiting the character of the street to be constructed on a level site.

The retaining wall reduces substantially and rapidly in height as the site ascends up Stoney Court.

The structure was measured on site to be approximately 3.3m in height at the north-eastern corner of the site, from the existing external ground level to top of pier. At the absolute corner of the site the retaining wall measures 2.7m in height with a further 600mm pier on top which was to form part of the fencing.

The applicant advised a pool is to be constructed in the north-east corner of the site where the bulk of the fill has been located and the fence on top of the retaining wall is both for fall safety and pool safety.

It was agreed to remove the 600mm pier on top of the retaining wall to the corner of the site and build the fence further back internally, thereby reducing the overall impact of the structure while still being able to achieve the required safety on top of a structure of this height.

It was advised that the corner lot, which is on the lower side of the site, was further excavated approximately 800mm to assist in achieving a better building platform for the adjacent corner lot. Visually this has added to the perceived height of the retaining wall in the corner, from the streetscape.

There remains little option but to cut and fill the site to be able to construct the proposed dwelling. The estate sites have cut and filled to enable the construction of the two storeys, masonry on slab dwellings which dominate the estate. The proposed dwelling appears to be consistent with the character of the estate.

The site to the rear of the lot is currently vacant and is higher than the subject site. It has a small retaining wall in place. The site to the south (left) has a two storey dwelling constructed on it and is approximately 1.2m higher than the subject site and requires a retaining wall to be constructed to finalize the project. These walls are all above the finished filled ground level of the subject site.

Onsite car-parking will be accessed via Stoney Court. The proposed driveway is to be located to the south of the site and in this location will not require an unnecessarily steep driveway.

The following correspondence and documentation was reviewed and taken into consideration:-

- **17 November 2009** – Appeal hearing
- **1 October 2009** – Mick & Z Homes (Mick Antoniou) – Order of events relating to application, discussions, construction and decisions relating to subject block retaining wall.
- **29 September 2009** – Building and Development Tribunals Appeal Notice – Form 10
- **23 September 2009** – Gladstone Regional Council to Mick & Z Homes Pty Ltd - Decision Notice – Refusal by Assessment Manager (Gladstone Regional Council) by direction of Concurrence Agency

(Gladstone Regional Council).

- **9 May 2009** – Gladstone Regional Council to Applicant – concurrence agency response - refusal
- **Part A & Part B** – IDAS application forms – unsigned and undated with attached plans approved and dated 17 September 2009 with combined retaining wall and fence height shown being maximum 3.0m reducing to 2.6m over the course of 8.0m in length.
- **25 September 2008** – Gladstone Regional Council – Refusal of retaining existing wall
- **23 July 2008** – Mick & Z Homes – letter to Gladstone Regional Council.
- **3 July 2008** – Gladstone Regional Council – letter to the applicant’s solicitors.
- **20 May 2008** – Klein & Associates – applicants solicitors requesting on site meeting.
- **Amalgamation of Councils**
- **4 March 2008** – Application to Calliope Shire Council for boundary dispensation.
- **7 December 2007** – Form 16 Inspection Certificate for footings for retaining wall.
- **4 December 2007** – Form 6 – Development Application Decision Notice – Approval with conditions for the construction of a retaining wall (class 10b) with plans showing a proposed height of 1.8m, reducing to 800mm.
- **2 November 2007** – Calliope Shire Council – Information Request.
- Plans and photographic documentation.

As a result of the assessment manager’s refusal of the building development application (based on concurrence agency advice), the applicant chose to appeal the decision to the Building and Development Tribunals by Notice of Appeal, received 8 October 2009.

Material considered

The material considered in arriving at this decision comprises:

1. Form 10 – ‘Notice of Appeal’ and grounds for appeal received 8 October 2009.
2. Decision notice from the assessment manager advising that the concurrence agency directed refusal of the development application, dated 23 September 2009.
3. Site plan, plans and elevations of the class 10b structure (retaining wall).
4. Verbal submissions from the applicant and reasons for class 10b structure (retaining wall) to be retained in full in its current size and location to the rear of the site.
5. Verbal submissions from the assessment manager, including reasons why the class 10b structure (retaining wall) should be modified.
6. IPA.
7. *Building Act 1975 (BA)*
8. *The Building Regulation 2006.*
9. The Queensland Development Code (QDC).
10. Pool Fencing Guidelines

Findings of Fact

The Tribunal makes the following findings of fact:

1. It was determined that the applicant/builder applied for, and received approval to, construct a

retaining wall along the eastern and northern alignments of the site to a maximum height of 1.8m in the north-east corner of the site, from the then Calliope Shire Council. The builder proceeded to construct the retaining wall as per approved plan.

2. The builder continued with construction of a 1.5m fence on top of the retaining wall as it was visually of the same construction type. The fence was constructed to be solid for the bottom 800mm. For 600mm above that the solid part of the fence it was to be concrete piers at 4.0m centres with open type fence panels between. The fence is required for safety purposes for a future pool and as it is on top of the retaining wall. This fence is to be constructed to comply with pool fencing guidelines.
3. The applicant lodged an "Application for Boundary Dispensation" with the Calliope Shire Council for the retaining wall / fence after discussions with relevant officers. Early in 2008 the Council was amalgamated into the Gladstone Regional Council and the new Council made the decision to refuse the application.
4. After the refusal by the Gladstone Regional Council the applicant stopped work and has made numerous efforts to discuss the matter with the Council (concurrence agency section) to reach a suitable outcome. However the Council (concurrence agency section) was unwilling to cooperate and did not attend the tribunal hearing.
5. It is clear from the site inspection that the retaining wall is serving a purpose separate and distinct to the associated fence and that the both are consistent with the other developments within the neighbourhood and which have received Council approval on lots with similar size, shape and outlook.
6. The site has been excavated, filled and levelled behind the retaining wall to a depth of fill in the north-east corner of approximately 1.8m. It appeared from the site visit that the proposed building platform has been achieved and is ready for final landscaping, therefore no additional fill would be required.
7. Advice was given that objections to the retaining wall were received from the neighbourhood and noted.

Reasons for the Decision

1. QDC NMP1.7 – RETAINING WALLS AND EXCAVATION AND FILLING

NMP1.7 of the QDC sets out Performance Criteria (P1 - P6) in relation to retaining wall excavation and filling requirements which a local government may consider and be satisfied that the application meets the intent of each criterion for that application. In addition, the development must not unduly conflict with the intent of each of the Performance Criteria:-

P1 – Filling or excavation must not impact adversely on the visual amenity or privacy of surrounding properties.

The filling and excavation of the site is consistent with the neighbourhood and surrounding developed sites.

The visual amenity of the neighbourhood will not be significantly affected by the filling and excavation of the site.

The privacy of the surrounding properties will not be affected by the filling and excavation of the site.

Rendering, painting and landscaping of the wall combined with the construction of the dwelling behind will significantly reduce the current visual impact of the retaining wall and fence.

P2 Filling or excavation must not worsen any flooding or drainage problems on the site or on neighbouring properties.

The filling and excavation of the site will reduce the impact of overland flow onto the neighbouring properties. By retaining the site the overland flow is able to be directed away from the adjoining property, collected and redirected into the existing stormwater system.

P3 Any structure used to restrain fill or excavation must not worsen drainage problems or cause surface water to be a nuisance to neighbouring properties.

The construction of the retaining wall ensures that the overland flow of water is directed away from the adjoining properties, thereby reducing drainage problems and surface water which would have caused nuisance to this property.

P4 Filling or excavation must not adversely affect sewer, stormwater or water utility infrastructure.

The filling and excavation of the site does not adversely affect the sewer, stormwater and water utility infrastructure as these were designed for, approved and constructed in accordance with approved plans during the initial construction of the retaining wall.

P5 Filling or excavation must not prevent access to the property.

The filling of the site is to the right of the proposed driveway. Therefore access to the property is directly from street level to similar platform level for the proposed garage location. This has ensured that a steep driveway has not been required on site.

P6 A method of restraining soil must not impose any adverse loads on sewer or stormwater drains or water mains.

The filling and excavation of the site does not adversely affect the sewer as this was designed for, approved and constructed in accordance with approved plans during the initial construction of the retaining wall.

Fencing on top of retaining wall associated with pool.

A pool fence is required to be constructed on top of the retaining wall to a minimum height of 1.2m and must comply with the QDC.

Pool Fencing Guidelines

Pool fencing to be located on top of the retaining wall must be minimum 1.2m in height and strictly in accordance with current legislation.

2. Based on the above facts it is considered that the appeal is upheld. The decision held in this application is separate to any other applications which may be made over the property at this time or in the future.
3. The QDC provides Performance Criteria and some Acceptable Solutions. The Acceptable Solutions are to provide reasonable and achievable outcomes. The local government is in a position to vary the Acceptable Solutions in relation to an application for siting requirements and to assess the application based on its merits.
4. In assessing the criteria from this part of the Code in relation to the class 10a structure (retaining wall) in its current location and height the Tribunal found that there were grounds to allow for the structure to be retained with minor modification the associated fencing on top.

Georgina Rogers
Building and Development Tribunal Chair
Date: 14 January 2010

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 Infrastructure and Planning
PO Box 15009
CITY EAST QLD 4002
Telephone (07) 3237 0403 Facsimile (07) 3237 1248