



Building and Development Tribunals—Decision

Integrated Planning Act 1997

Appeal Number: 3—08—045

Applicant: *withheld*

Assessment Manager: Brisbane Certification Group

Concurrence Agency: Brisbane City Council
(if applicable)

Site Address: *withheld*—the subject site

Appeal

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the Brisbane Certification Group based on the Concurrence agency response issued by Brisbane City Council to refuse a Siting Variation (Relaxation) Application relating to a tennis court fence in excess of 2 m in height.

Date of hearing: 10.00am, Friday 11 July 2008

Place of hearing: The subject site

Tribunal: Dr Robin King-Cullen - Chairperson
Dr Peter McDermott - Member

Present: Applicant
Applicant's architect
Applicant's urban planner
Glynn Verity – Brisbane City Council representative
Chris Savory – Brisbane City Council representative
Martin McNamara – Brisbane City Council representative

Decision:

The Tribunal **dismisses** the appeal as it does not have jurisdiction to hear the matter for the following reasons:

- (a) the relaxation applied for relates only to a fence/tennis court fence in excess of 2 m in height, however the fence/tennis court fence is constructed on other walls/structures for which a development permit is first required; and
- (b) Section 83(1) (a) of the *Building Act 1975* (BA) prohibits the granting of a building development approval until, under IPA, all necessary development permits are effective for the other development.

Background

1. The matter concerns the decision of the private certifier to refuse a development permit for building works, in regard to "Alteration to Existing Dwelling including Garage" on the subject site. The reason for refusal was "Council as a Concurrence Agency refusing the application to vary the siting requirements of the Queensland Development Code MP1.2".
2. The building works referred to in 1 above comprise a rendered concrete block wall garage constructed with 0 m setback from both the road boundary and the eastern side boundary, together with a crib lock wall constructed on top of a previously constructed blue stone wall. A lighted tennis court is constructed on top of the garage. The tennis court fence is constructed with 0 m setback from both the road boundary and the eastern side boundary and is stated in the Siting Variation (Relaxation) Application to be from 3.6 m to 7.5 m in height above natural ground level.
3. The building works referred to in 2 above already exist on the subject site and have been built without the necessary development permit/s having first been obtained. Development of the subject site has occurred progressively since June 2005, when a removal house was located on the site under a building approval issued in April 2005 by Queensland Building Approvals. The building approval at that time included a swimming pool in addition to the house, but did not include the garage/tennis court referred to in 2 above.
4. In or around February 2007 (according to the Applicants' Grounds of Appeal accompanying the Appeal Notice), the garage/tennis court was constructed on the subject site. The garage/tennis court referred to in 2 above was built partly within privately owned land and partly within what was, at that time, road reserve. The Tribunal was advised that there was no contract for the construction of the building works.
5. No development permit was applied for in relation to the building works referred to in 3 above. However, the following correspondence has been provided to the Tribunal in relation to those works:
 - Advice from Council dated 31 August 2005 that a Footway Permit is issued for the period 31 August 2005 to 31 August 2006 "to extend the existing stone wall and construct a new wall as detailed on drawing no. SK-01, plan 426.41 and plan 426.40 as submitted to Council on 29 August 2005". The Tribunal noted that the construction of the new wall occurred after the Footway Permit expired and also noted that condition 2 of that Permit stated (in part) that "All work is ...subject to... other applicable laws"; and
 - Advice from Queensland Department of Natural Resources and Water (NRW) dated 26 March 2008 that indefeasible title No 50710848 has issued over Lot 1 on SP 184039. The effect of the issue of this title was to add 61 square metres of closed road to the site and render the works referred to in 3 above entirely within the subject site.
6. According to the Applicants' Grounds of Appeal accompanying the Appeal Notice, ownership of the subject site transferred to the Applicants on or about 11 September 2007.
7. Upon receipt of title to the closed road from NRW building approval was sought from the private certifier for the building works referred to in 3 above.
8. In March 2008, a Siting Variation (Relaxation) Application was lodged with Council by the private certifier requesting siting variation for a Fence/tennis court fence to be erected from 3.6 m to 7.5 m in height above natural ground level. The Siting Variation (Relaxation) Application was incomplete in that it did not state the road boundary and side/rear boundary relaxations required, and did not address all relevant Performance Criteria. The application was accompanied by a neighbour's statement from the adjoining property owner to the east advising she has viewed the plans 426.60, 61, 62, 63, 64, 65, 66, 67 and 68; that she fully understands what is being proposed; and that she has no particular concerns with the proposal.

9. By letter dated 27 May 2008, Council advised the private certifier of their Referral (Concurrence) Agency Response that “this application has been assessed against the applicable performance criteria (QDC Part 12, P1, P2, P3 and P6)” and “this proposal has been refused” and “the subject class 10a Garage/Tennis Court being built to the road boundary, and having a proposed maximum height of approximately 5,600 mm represents significant elevation considering the lack of similar buildings or structures within the current streetscape and immediate proximity to the Garage/Tennis Court above”. Council’s response was not given within the Referral Agency’s assessment period under IPA and appears to have only addressed the road frontage relaxation. Under Section 3.3.16(4) (c) of IPA, the referral agency’s response is taken to be a refusal of the application.
10. The private certifier issued a decision notice dated 23 June 2008 advising that the development application was assessed and refused.

Material Considered

- Copy of the Siting Variation (Relaxation) application to Council dated 13 March 2008, including Neighbour’s Statement, photographs, and drawing number 426.60 dated November 05 titled “Parkham Car Park and Tennis Court – Site Plan showing amendments to original approval”, drawing number 426.61 dated November 05 titled “Parkham Car Park and Tennis Court –Plan at House Floor Level”, drawing number 426.62 dated November 05 titled “Parkham Car Park and Tennis Court – Plan at Car Park Level”, and drawing number 426.63 dated November 05 titled “Parkham Car Park and Tennis Court –Plan at Street Level”.
- Copy of the notification dated 26 March 2008 from NRW to the Applicants regarding their application for permanent road closure of part of their street.
- Copy of Footway Permit from Council to the Applicants’ architect regarding the subject site issued on 31 August 2005. The Tribunal noted that only the first page of this four page document was provided with the Appeal documents, however the remaining three pages (including the conditions of the Permit) were later provided by Council.
- Copy of undated drawing number 426.40 titled “Parkham Redevelopment Existing Site Plan” prepared by the Applicants’ architect, as submitted to Council on 29 August 2005 in relation to a Footway Permit application.
- Copy of undated drawing number 426.41 titled “Parkham Site Development – Street Elevation” prepared by the Applicant’s architect, as submitted to Council on 29 August 2005 in relation to a Footway Permit application.
- Copy of notification dated 27 May 2008 from Council to the private certifier of Referral (concurrence) Agency Response under the IPA Part 3.3.16 for design and siting.
- Form 10 – Building and Development Tribunals Appeal Notice, dated 24 June 2008, against the decision of the private certifier to refuse the application and setting out the grounds of the appeal.
- Verbal submissions made by the Applicants and the Applicants’ architect and urban planner on 11 July 2008 stating reasons for the appeal and setting out why the appeal should be allowed.
- Verbal submission made by Council’s representatives on 11 July 2008 setting out why Council had refused the application and why the appeal should not be allowed.
- Copy of statement shown at the Tribunal hearing by a neighbour to the west of the subject site advising she “has no objection to that approval process taking place”.

- Email correspondence dated 16 July 2008 from Council to the Tribunal Chair (copied to the Applicants' urban planner) that "The structure constructed on the premises building works requires a Development Permit – Material Change of Use – Extensions to a House in a Demolition Control Precinct. The assessment process involves assessment against the Brisbane City Plan 2000 – House Code and Character Code".
- The *Building Act 1975*.
- The *Integrated Planning Act 1997*.
- The Queensland Development Code.

Findings of Fact

The Tribunal makes the following findings of fact:

1. The subject site contains an area of 643 square metres, is irregular in shape, and rises steeply up from street level to the rear of the site.
2. The building works, subject of the building development application, already exist and were constructed without the necessary development permit or permits having been applied for or given. Notwithstanding the wording of the Footway Permit issued by Council on 31 August 2005, that Permit did not authorise the building works to occur.
3. The building works, subject of the building development application, first require a Development Permit – Material Change of Use – Extensions to a House in a Demolition Control Precinct.
4. The Tribunal has no jurisdiction to deal with a matter under the Planning Scheme.

Reasons for the Decision

- The fact that the garage/tennis court exists unlawfully is no justification, of itself, for approval.
- The relaxation applied for relates only to a Fence/tennis court fence in excess of 2 m in height, however the Fence/tennis court fence is constructed on other walls/structures for which a development permit is first required.
- The Tribunal does not have jurisdiction under Section 4.2.7 of the IPA to decide on the other walls/structures for which a development permit is first required.
- Section 83(1) (a) of the BA prohibits the granting of a building development approval until, under IPA, all necessary development permits are effective for the other development.

Robin King-Cullen
Building and Development Tribunal Chair
Date: 29 July 2008

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