



Building and Development Tribunals – Decision

Integrated Planning Act 1997

Appeal Number: 3–08–057

Applicant: Dario Sacilotto

Assessment Manager: Fraser Coast Building Certification

Concurrence Agency: Fraser Coast Regional Council
(if applicable)

Site Address: 16 Hillcrest Avenue, Scarness and described as Lot 6 on RP119678—the subject site.

Appeal

Appeal under section 4.2.9 of the *Integrated Planning Act 1997* (IPA) against the decision of Fraser Coast Building Certification to refuse a building development application based on the concurrence agency response received from Fraser Coast Regional Council relating to the height of an existing fence to the rear boundary of the subject site.

Date of hearing: 11am – Wednesday 10 September 2008

Place of hearing: The subject site

Tribunal: Mr Geoff Cornish – Chair
Mr Laurie Barnett – Member

Present: Mr Dario Sacilotto – Applicant
Mr Chris Olive – Fraser Coast Building Certification
Mr Stephen Clark – Fraser Coast Regional Council Representative
Mr John Fraser – Fraser Coast Regional Council Representative

Decision:

The Tribunal, in accordance with 4.2.34(2)(c) of the IPA, **sets aside** the decision of the assessment manager to refuse the building development application, and replaces it with the following decision.

The assessment manager is **directed** to reassess and decide the building development application, subject to compliance with all other relevant building assessment provisions, and including the following conditions:-

- The maximum height of the structure shall not exceed 2.4 metres above existing ground level on the applicant's side of the boundary.
- The applicant shall provide the Council with certification demonstrating that the fence as initially constructed is structurally capable of withstanding N3 design wind gust speeds.
- The finish to the plywood, above the level of the original fence and facing the neighbours, shall be standard fence paint of a colour to be chosen by the neighbours and advised to the applicant in writing by the Council. In the event that no colour is advised within 20 business days of this decision, the plywood may then remain unpainted.

Background

The matter concerns the decision of the Fraser Coast Regional Council, as a concurrence agency, to refuse to vary the permissible height for a rear fence necessary to obtain a development approval for the existing structure.

While the Council had previously indicated its lack of objection to the existing structure, it had placed conditions on the applicant to obtain the neighbours' written agreement. A long standing dispute between the neighbours on other issues had resulted in such an agreement being unreachable.

The Council initially took action regarding this fence in early March 2007, but appears to have done little to address the underlying problem that prevents an agreement from being reached. Consequently this matter has come to appeal requiring the Tribunal to resolve the impasse.

Material Considered

The material considered in arriving at this decision comprises:

- The application, including Form 10 - Notice of Appeal, supporting sketch plan and documentation;
- Council's Concurrence Agency response dated 14 April 2008;
- Verbal submissions from all the parties at the hearing;
- Written submission from the adjoining neighbours to the north;
- A written submission from the applicant commenting on the above submission from the neighbours;
- The Queensland Development Code (QDC) – Part MP 1.2;
- The *Building Act 1975*; and
- The IPA.

Findings of Fact

The Tribunal makes the following findings of fact:

- The subject site contains a double storey dwelling, swimming pool, pool shed and colorbond side and rear fences.
- The rear fence and sections of the side fences all exceed 2.0 metres in height above natural ground level.
- Only the height of the rear fence has been raised by Council as being in dispute.
- The neighbours to the north of the subject site have a double storey dwelling and a large shed on their property.
- There is extensive landscaping on both sides of the disputed fence.
- Extensive drilling has been undertaken on the neighbour's side of the plywood sheeting that provides structural support to the colorbond fence.
- The large shed on the neighbour's property is situated between the neighbour's dwelling and the fence.
- None of the parties to the appeal invited the adjoining northern neighbours to make a written submission to the Tribunal, prior to the hearing, identifying their concerns.

- The actions of the Council in the conduct of this matter have been based on the lack of an agreement between the applicant and his neighbours. The Council was aware of an unresolved dispute between the parties and therefore had an obligation to invite the neighbour's submission.

Reasons for the Decision

- The fence, as constructed, is consistent on the applicant's side with the adjoining side fences in respect of both finish and height.
- The fence, on the northern neighbour's side, is extensively screened by existing landscaping and a substantial shed erected at the rear of that neighbour's property.
- The fence is located at the rear of the properties and has no impact upon either streetscape.
- The general views from the northern neighbour's property are to the north away from the fence. The Tribunal considers that the views of this neighbour are not affected by the fence.
- As the fence is extensively screened on the northern neighbour's side by existing landscaping on that side of the fence and by the existing substantial shed constructed between the neighbour's dwelling and the fence, the Tribunal considers that the outlook from the neighbour's dwelling is not substantially affected.
- The fence runs east west and is positioned approximately 15 metres to the south of the rear of the neighbour's dwelling. The Tribunal considers that the fence cannot have any effect upon the light or ventilation of habitable rooms within that dwelling, contrary to the claim by Council.
- As the neighbour's shed has no windows facing the fence, the fence has no effect upon the light or ventilation of that shed.
- As the fence is substantially screened on the neighbour's side by landscaping and the neighbour's own shed, the Tribunal considers that the increased height of the fence does not adversely impact upon the neighbour's amenity.
- As the fence is higher than normal, the privacy of the adjoining neighbour has been improved by its construction rather than diminished as claimed by Council.
- The Tribunal is of the opinion that the performance provisions of Part MP 1.2 of the Queensland Development Code are met by the fence as currently constructed.
- The Council has, in writing to the applicant on 16 August 2007, expressed the view that it had "**no objection to the increased height of the fence**", providing that any approval to erect the fence specifies a finish to the side facing the adjoining neighbour that is agreed upon by the owner of that property and that the fence is structurally capable of withstanding N3 design wind gust speeds. These aspects are conditioned in the decision.
- The Council was aware that there was a long standing unresolved dispute between the neighbours over noise emanating from the neighbour's property and the likelihood that no agreement would be capable of being reached regarding the finish to the fence.
- The written submission received from the northern neighbours raises several issues that are not relevant to the legislation or that cannot be reasonably attributed to the increase in height of the fence. The matter of stability of the fence is addressed in the decision. The noise emanating from the neighbours' property has contributed to the ongoing dispute and the neighbours are now complaining that the increase in fence height is resulting in more of their own noise being contained within their own property.

- Council has consistently failed to address matters within the prescribed time constraints of legislation or as set by the Tribunal.
- Council failed to provide the requested evidence of its documented assessment of the application for an increase in fence height prior to Council's refusal of that application. The Tribunal has concluded that no proper assessment was ever undertaken or documented by Council and this would be consistent with the obvious incorrect statements contained within Council's decision.
- Council failed to provide any support for the submission made by the adjoining neighbours.

Geoff Cornish
Building and Development Tribunal Chair
Date: 8 October 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:

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