



Development Tribunal – Decision Notice

Planning Act 2016

Appeal Number:	06-18
Appellant:	Rob & Wendy Howard
Assessment Manager:	Grant Forde – Integrated Building Certification
Concurrence Agency: (if applicable)	Toowoomba Regional Council
Site Address:	141-143 South Street, South Toowoomba and described as Lot 26-27 on RP71057 – the subject site

Appeal

The appeal under section 229 of the Planning Act 2016 (PA) against the decision of the assessment manager to refuse the Development Application (Application) for tennis court fencing and lighting structures within the prescribed setbacks to the side and rear boundaries. Toowoomba Regional Council as the concurrence agency directed the refusal.

Date and time of hearing:	15-May-2018 at 11:00am
Place of hearing:	The subject site
Tribunal:	James Dunstan – Chair Lynette Prince-Large - Member
Present:	Rob Howard – Appellant Wendy Howard – Appellant Wayne Graf – Builder Grant Forde – Assessment Manager David Krumins – Toowoomba Regional Council Jade Bebbington – Toowoomba Regional Council

Decision:

The Development Tribunal (Tribunal), in accordance with section 254 of the *Planning Act 2016* (PA) **replaces** the decision contained in the decision notice of the Assessment Manager dated 8 February 2018 with a decision **approving** the siting of the tennis court fencing and lighting structures with the following conditions:

1. The minimum side and rear boundary setback permitted is 500mm to the fence line;
2. The maximum height of the fence shall not exceed 3.9m above Natural Ground Level;
3. The maximum height of the light poles shall not exceed 4.5m above Natural Ground Level (NGL);
4. Fencing installed is to be of chainwire material or similar and must remain transparent;
and
5. Artificial lighting shall be directed internally to the site area only, to minimise light pollution to neighbouring sites.

6. Prior to any works commencing, the appellant is to obtain a development approval for building works for the assessable building works.

Background

The subject site is a dual title, rectangular allotment having an area of 1822m². The lot is developed for residential purposes with a detached house, associated ancillary structures and landscaping.

The building work subject to the appeal is fencing associated with establishment of a tennis court area in the North Eastern corner of the allotment. The proposed variations to the Queensland Development Code, MP1.2, clause A2 are as follows:

- Side setback of 500mm in lieu of prescribed 1500mm for combined retaining and fencing exceeding 2000mm in height above NGL to a maximum height of 3900mm above NGL;
- Side setback of 500mm in lieu of prescribed 1500mm for a lighting structure to a maximum height of 4500mm above NGL
- Rear setback of 500mm in lieu of prescribed 1500mm for combined retaining and fencing exceeding 2000mm in height above NGL to a maximum height of 3900mm above NGL;

The site has adjoining dwellings located to both boundaries proposed to be encroached.

A Development Application (Application) was submitted for building approval to the assessment manager for the lighting and combined retaining/fencing exceeding 2m in height.

During the application process, the Assessment Manager lodged a Concurrence Agency referral to Council. On the 26 September 2017, Council issued a refusal on the following grounds:

“The reason for council’s refusal is that the proposal is deemed to be inconsistent with the Performance Provisions P2 of the Queensland Development Code, Mandatory Part 1.2, namely:

P2 Buildings and Structures –

(c) adversely impacts on the amenity and expected privacy of residents on adjoining lots”

The assessment manager, upon receiving the Council advice, issued a Decision Notice dated 08/02/18 which refused the part of the application for the subject building works in accordance with the Concurrence Agency advice that the proposal was inconsistent with the performance outcomes of QDC MP1.2 A2.

The appellant then lodged an application form (form 10) with the tribunal registrar on 9 February 18. A hearing was conducted on the subject site commencing at 11:00 am on 15 May 2018.

The Appellant and council representatives made the following representations at the hearing:

Appellant:

- The actual setback of the structure was clarified from the plans as being located no closer than 500mm to the property boundary and existing fencing structures;
- The existing fence structure is to remain in situ;
- During the application process, consultation was undertaken with eastern neighbour and consent obtained at the request of council;
- Siting towards the rear boundary was in consideration of the existing sewer infrastructure located within the property;
- Location of proposed tennis court was to retain existing private open space and rear yard space for use;
- During application process, council did not provide feedback regarding possible alternative siting;

- The tennis court area is for private use only and would not be used late at night or for any other purpose;
- To the best of their knowledge, council had not come to site to view the property and the impacts;
- The proposed fencing would be chainwire construction and would remain transparent

Council:

- The refusal was based on the requirements of P2(c) as council has concerns regarding impact on amenity and privacy to the adjoining neighbour, in particular the eastern neighbour;
- Although this neighbour provided written consent, council has concerns on future amenity for possible future owners of the adjoining property;
- Council has concerns on level of noise and light pollution from the use of the area as a tennis court;
- Council had done a site inspection as part of their assessment process;

Following the hearing, the tribunal requested the following documentation to be provided:

- Council – A copy of the site inspection report and assessment from the responsible council officer;
- Appellant – Obtain signed neighbour's consent from the affected neighbour on the northern boundary

This information was provided to the tribunal on Friday 18 May 2018.

Material Considered

The material considered in arriving at this decision comprises:

1. 'Form 10 – Appeal Notice', grounds for appeal and correspondence accompanying the appeal lodged with the Tribunals Registrar dated 9 February 2018.
2. Decision Notice – Refusal for works within setbacks dated 08 February 2018
3. Council Concurrence Agency Response – Refused by Toowoomba Regional Council dated 26 September 2017;
4. Council assessment report dated 25 September 2017 provided after the hearing;
5. Plans and specifications provided by the appellant for the proposed fencing and lighting structures;
6. Neighbours statement provided from the registered owner located at 139 South Street, South Toowoomba (Eastern Boundary) 8 November 2017;
7. Neighbours statement provided from the registered owner located at 8 Cranley Street, South Toowoomba (Northern Boundary) dated 16 May 2018, provided after the hearing;
8. The *Planning Act 2016*;
9. The *Planning Regulation 2017*;
10. The Queensland Development Code, Mandatory Part MP1.2 (QDC);
11. Verbal representations by the Appellant at the hearing;
12. Verbal representations by the Council at the hearing;

Findings of Fact

The Tribunal makes the following findings of fact:

- The application made to Integrated Building Certification, as the Assessment Manager was correctly referred to council as a Concurrence Agency under the *Planning Regulation 2017, Schedule 9, Table 3*;
- The items for consideration for the concurrence agency assessment are the height of the fencing and lighting structure exceeding 2m above NGL within 1.5m of the side boundary setback;
- The proposed fencing material is to be chainwire fencing which is open and transparent, with no bulky fencing materials to be used;
- During the concurrence referral process, council requested the neighbour located at 139 South Street, South Toowoomba be consulted. This was undertaken and a signed letter of consent was provided in response to the information request, citing no objections or concerns with the proposal;
- The reason for refusal by council was as follows:
*“The reason for council’s refusal is that the proposal is deemed to be inconsistent with the Performance Provisions P2 of the Queensland Development Code, Mandatory Part 1.2, namely:
P2 Buildings and Structures –
(c) adversely impacts on the amenity and expected privacy of residents on adjoining lots”*
- It is determined by the tribunal, that the impacts of the neighbours amenity and expected privacy has been addressed under P2(c) of QDC, as they have been consulted as part of the application process, and both affected neighbours have given written consent to the proposal;
- The reduced setback for the fencing will have minimal additional impact on amenity and privacy of neighbours compared to if it were compliant at 1.5m under QDC.

Reasons for the Decision

The tribunal has considered all the information provided and has assessed the proposed fencing and lighting structure to satisfy the performance criteria of P2 (a, b & c) under the QDC based on the following:

- P2(a) The proposed fencing and lighting structures are transparent in construction and will have no impact on ventilation to habitable rooms; and
- P2(b) The proposed fencing and lighting structures are transparent in construction and will have no impact on natural lighting to habitable rooms; and
- P2(c) The proposed fencing and lighting structures have been reviewed by the affected neighbours at 139 South St South Toowoomba, and 8 Cranley Street South Toowoomba. Each neighbouring resident (as the registered property owner) have provided written consent to the proposed structures and cited no objections. This consultation and written consent by the registered owner of the land is deemed to satisfy the criteria regarding residents of neighbouring lots.

James Dunstan
Development Tribunal Chair
Date:

Appeal Rights

Schedule 1, Table 2 (1) of the *Planning Act 2016* provides that an appeal may be made against a decision of a Tribunal to the Planning and Environment Court, other than a decision under section 252, on the ground of -

- (a) an error or mistake in law on the part of the Tribunal; or
- (b) jurisdictional error.

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

Enquiries

All correspondence should be addressed to:

The Registrar of Development Tribunals
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