



**Building and Development Tribunals**

Queensland Government

Department of Local Government and Planning

**APPEAL**  
**Integrated Planning Act 1997**

**File No. 3/07/046**

## **BUILDING AND DEVELOPMENT TRIBUNAL - DECISION**

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**Assessment Manager:** Maroochy Shire Council

**Site Address:** *withheld*—“the subject site”

**Applicant:** *withheld*

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### **Nature of Appeal**

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* against the decision of Caloundra Building Approvals to refuse an application to construct a swimming pool on “the subject site”.

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**Date and Place of Hearing:** 11.00am Tuesday 11 September 2007  
at “the subject site”

**Tribunal:** Geoff Cornish – Tribunal Chair  
John Gillespie – Tribunal Member

**Present:** Geoff Cornish – Tribunal Chair  
John Gillespie – Tribunal Member  
Applicant  
Andrew Stewart – Caloundra Building Approvals  
John Dunn – Maroochy Shire Council Representative

### **Decision**

The decision of Caloundra Building Approvals, as contained in its written Decision Notice, to refuse an application for the construction of a swimming pool, is **set aside** and **the application is approved** subject to the following conditions:

- 1. A one metre high safety glass fence is to be erected and positioned centrally on the eastern coping of the pool, extending from the front (road) edge of the pool to a point 50mm beyond the step in the existing boundary wall. A gap of 200mm shall be maintained under this glass fence to facilitate cleaning and maintenance of the face of the existing wall.*

2. *A safety glass fence is to be constructed centrally positioned along the front (road) coping of the pool, extending from the eastern boundary wall to the wall adjacent to the driveway. The top of this fence shall match the level of the top of the existing eastern boundary wall at its junction with it. A 50mm gap shall be maintained between the bottom of the glass and the pool coping to facilitate cleaning.*
3. *Landscaping between the pool and the road boundary of the property is to be upgraded to the approval of Council. In undertaking this work, care is to be taken to continue to maintain a 1200mm clear arc from the outer edge of the pool coping clear to any climbable object.*
4. *No future front fence is to be constructed on the road boundary or anywhere between the road boundary and the front of the pool, without the prior written approval of the Council.*
5. *The existing height of the coping of the pool above natural ground level within 6 metres of the road boundary may be retained at a maximum of 1.7 metres.*
6. *The existing heights of the eastern side boundary wall above natural ground level may be retained without any future additions or modifications. These existing heights include a height of 2.75 metres at the top of the glass pool fence adjacent to the stairs down to the pool deck, 2.55 metres at the step in the wall and 2.05 metres at the end of the wall at its closest point to the road.*

## **Background**

The matter concerns the refusal of a swimming pool application made to Caloundra Building Approvals as a private building certifier. The application required submission to Maroochy Shire Council, as a concurrence agency, as it did not meet the “acceptable solutions” provisions of Part 12 of the Queensland Development Code. It thus required assessment by the Council against the performance provisions of the code. The Council undertook an assessment and subsequently directed the certifier to refuse the application. The grounds given for refusal were that the application did not comply, nor could it be conditioned to comply, with the code provisions.

The builder did not wait until an approval had been issued but proceeded to construct the pool while the assessment was being undertaken by his certifier and Council.

## **Material Considered**

1. Copy of the 18 July 2007 application made by Caloundra Building Approvals to Maroochy Shire Council for their assessment, as a concurrence agency, against the performance requirements of the QDC, seeking the granting of a siting variation;
2. Letter dated 2 August 2007 from Maroochy Shire Council to Caloundra Building Approvals stating that the application had been assessed and directing that the application made to Caloundra Building Approvals for construction of the pool be refused;
3. Form 10 – Building and Development Tribunals Appeal Notice and attachments, dated 31 August 2007, against the decision of Caloundra Building Approvals to refuse the application and setting out the grounds of the appeal;
4. Form 18 – Notice of Election received 4 September 2007 from Maroochy Shire Council electing to be a co-respondent to the appeal;
5. Verbal submissions made by the applicant and his private certifier on 11 September 2007 setting out why they believed the appeal should be allowed;
6. Verbal submission made by John Dunn of Maroochy Shire Council setting out why refusal of the application had been directed and why the appeal should not be allowed in its present form;

7. The *Building Act 1975*;
8. The Queensland Development Code Part 12; and
9. The *Integrated Planning Act 1997*.

### **Findings of Fact**

The Tribunal made the following findings of fact:

1. Construction of the swimming pool commenced shortly after the application for its approval had been lodged with Caloundra Building Approvals.
2. Construction commenced before assessment of the application had been completed and before any approval had issued.
3. The Council directed the certifier to refuse the application.
4. The application for approval to construct the pool was refused by the certifier. No approval has subsequently issued.
5. Construction is complete and the pool is filled with water.
6. The approval originally given for the construction of the dwelling, issued by a different certifier, expressly excluded any approval for the pool.
7. The pool, as constructed, is differently sited from that shown on the approved plans for the dwelling.
8. The applicable siting code is the QDC, as Maroochy Plan 2000 does not contain any specific alternative siting provisions for swimming pools. The QDC does contain specific pool siting requirements in Part 12. The provisions of that code have not been met.
9. The owner of the adjoining property has not objected to the current siting of the pool on the subject site. The owner of the adjoining property is, in fact, the developer and current owner of both the subject site as well as the adjoining property.

### **Reasons for the Decision**

1. To make this pool comply strictly with the “acceptable solutions” criteria of the code it would require the pool’s demolition and reconstruction. It would also require modifications to the currently constructed heights of the eastern boundary wall.
2. The Council took the view that it did not wish to establish a precedent just to overcome the errors made by the developer through his builder’s actions. Council took the view that it could not condition the application to comply with the code provisions.
3. The impact of the pool on the amenity of the adjoining property would not alter greatly if it and parts of the boundary wall were to be demolished and reconstructed at lower complying levels. Therefore there is no justification for demolition and reconstruction of the pool.
4. An approval is now required for variations of the code requirements in order to enable an approval to be issued for the pool in its current location and at its current height above finished ground level.
5. Approval is also required to undertake further work to protect the neighbouring property from water splashing from the pool onto that property. This aspect can be addressed by the addition of a one metre high glass fence positioned centrally along the pool coping. This further work also does not meet the “acceptable solutions” criteria of the code due to its height above natural ground level.

6. Other sections of the existing eastern side fence and glass pool fence at the top of the stairs require approval to remain at their current heights above natural ground level.
7. Any future purchaser will have the opportunity to make his or her assessment of the significance of the impact of the pool and wall prior to purchasing the adjoining property.
8. Given the concessions necessary to obtain approval for the pool as constructed, it is reasonable to require action to be taken to address safety aspects as part of that approval. Due to of the height of the pool above ground, persons using the pool could be at risk of falling if they sit on the narrow coping at the front edge. Access to this area should be discouraged to minimise the danger. Council also expressed concern at the potential for someone on a floating mattress to roll over the front edge of the pool. These issues are addressed in a condition of the approval.
9. The nature of the subdivision development is such that front fences are not desirable and the fronts of properties are encouraged to be landscaped to an acceptable level. Additional landscaping, to a level acceptable to Council, can be utilised to minimise the effects of the siting of the pool. This will also aid in providing privacy for persons using the pool from observation from the street. The future construction of a front fence should, as a condition of this approval, be prevented without the express separate approval of Council.

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**Geoff Cornish**  
**Building and Development**  
**Tribunal Chair**  
**Date: 14 September 2007**

## **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 Local Government, Planning, Sport and Recreation  
PO Box 15031  
CITY EAST QLD 4002  
**Telephone (07) 3237 0403 Facsimile (07) 32371248**