



Building and Development Tribunals

Queensland Government

Department of **Local Government and Planning**

APPEAL

Integrated Planning Act 1997

File No. 03-06-106

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Maroochy Shire Council

Site Address: *Withheld* – “the subject site”

Applicant: *Withheld*

Nature of Appeal

Appeal under Section 4.2.9 of the *Integrated Planning Act 1997* (“IPA”) against the decision of the Maroochy Shire Council to refuse an application for Building Works – siting variation on “the subject site”.

Date and Place of Hearing: 10.00 am Thursday 30 August 2007
at “the subject site”

Tribunal: Mr Paul R Smith – Chairperson

Present: Agent for the applicants;
Ms Julie Edwards – Maroochy Shire Council Representative;
Mr Ted Hungerford – Maroochy Shire Council Representative;
Mr Steven Tucker – Maroochy Shire Council Representative.

Decision:

The decision of the Maroochy Shire Council as contained in its written Decision Notice dated 26th October 2005, to refuse an application for relaxation of the boundary setback, is **set aside** and **the application is approved, subject to the following conditions:**

- (a) the following structures may be located within 1.5 metres of the boundary of the subject land:
- (i) the existing swimming pool; and
 - (ii) the existing platform surrounding and giving accesses to the existing swimming pool;
and
 - (iii) a security fence erected on top of the existing platform.

- (b) The fence referred to in condition (a) (iii) hereof must be of a height that is more than is necessary to comply with the swimming pool fencing requirements of the *Building Act 1975* or as is otherwise required for safety purposes and be of a construction that does not obstruct the view from the neighbouring property more than is reasonably necessary for safety purposes.

Material Considered

The material considered in arriving at this decision comprises:

- The initial application lodged with the Building and Development Tribunal on 25 November 2005 containing supporting plans and documentation;
- Written submissions received from both parties prior to the on-site hearing;
- An inspection of the site;
- Oral submissions made by the representatives at the hearing in support of the written submissions;
- Relevant sections of Maroochy Planning Scheme; and
- “IPA”.

Findings of Fact and Reasons for Decision

The Subject Site

- The subject site is described as Lot “*withheld*”, located at “the subject site”.
- For the purposes of this appeal, I have considered the subject site to include that part of the adjoining land that has been acquired to accommodate part of the swimming pool and enclosure, that was originally constructed partly of the adjoining land, although I understand that the reconfiguration has not yet been registered.
- The adjoining property is presently undeveloped, but is shown as “withheld” on the Council’s Planning Scheme (Planning Area no. 6), so that there is an expectation that it will be developed for allotments of approximately 2500m² or larger at some time in the future.

The Swimming Pool and Enclosure

- The swimming pool, with a surrounding platform giving access to the swimming pool, and a shade cloth enclosure are existing on the subject site.
- The shade cloth enclosure sits on top of the pool area and has a gabled appearance, and varies in height from about 2.0m to about 3.5m in the centre. The enclosure is not waterproof but provides protection from the sun and prevents leaves and other debris from falling into the pool.
- The edge of the platform, and the shade cloth enclosure, extend to, or near to, the boundary of the subject site.
- Due to the steeply sloping land, at its western end, the swimming pool is in the ground but at

its eastern end is out of the ground.

The Relaxation Sought

- This is an appeal against Council's decision to refuse to relax the normal 1.5 metre side boundary clearance so as to permit the swimming pool and an enclosure over the pool to be retained in their present form.
- Council, in its original decision, refused to relax the boundary clearance on the basis of alleged non-compliance with **Performance Criterion P2** of the **Code for Development on Steep or Unstable Land**. That Criterion provides that:

Buildings and other structures must be designed and sited to minimise adverse impacts on the amenity of neighbouring sites with regard to ensure acceptable:

- *Natural light and ventilation;*
 - *Views and outlook;*
 - *Privacy.*
- I am of the opinion that if the relaxation sought complies does not comply with the above referred Performance Criterion P2, or cannot be made to comply by the imposition of reasonable or relevant conditions, it should be refused. However if it does comply, or may be made to comply, it should be approved.

Natural light and ventilation

- This is not a matter in issue in this appeal.
- It is common between the parties that adverse impacts on natural light and ventilation, caused by the swimming pool and enclosure on the neighbouring site, if any, are acceptable. The Tribunal agrees with the parties on this issue.

Views and outlook

- This is a matter in issue in this appeal.
- The appellants are of the opinion that both the swimming pool and shade cloth enclosure do not have an unacceptable adverse impact on the views and outlook from the neighbouring site. The appellants are of the opinion the both should be permitted to remain unaltered in their present form
- The appellant's representative at the hearing suggested that the enclosure could, if the existing enclosure was held to be presently unacceptable, be altered in some way to make it acceptable. The Tribunal has not been presented with any proposed amendments or alterations to the shade cloth enclosure and express no opinion on whether an amended or altered enclosure would be acceptable or not.
- Council is of the opinion that both the swimming pool and shade cloth enclosure have an unacceptable adverse impact on the views and outlook from the neighbouring site.
- The Tribunal has formed the opinion that the shade cloth enclosure, in its present form, is a

substantial structure which, because of its height has an unacceptable adverse impact on the views and outlook from the neighbouring site.

- The Tribunal has formed the opinion that there is some adverse impact on the views and outlook from the neighbouring site caused by the location of the pool and its surrounds platform but that impact is minimal and acceptable.
- For safety reasons, a perimeter fence is required to prevent people falling off the edge of the pool platform and possibly, in places, to prevent children from entering into the pool area from the adjoining site. Such perimeter fence would not have unacceptable impacts on the views and outlook from the neighbour's site if constructed in an open mesh or other largely see-through form. However, the Tribunal is of the opinion that a high solid fence would have an unacceptable adverse impact on views and outlook from the neighbouring land.

Privacy

- The location of the swimming pool has the potential to create some overlooking onto lower areas of the adjoining land, however the Tribunal has formed the opinion that the adverse impact, if any, would be minimal and acceptable.

The Tribunal complement the representatives at the hearing

The Tribunal complements all representatives at the hearing for their candid, respectful and helpful submissions.

Mr Paul R Smith

Building and Development Tribunal General Referee (Chair)

Date: 19 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:

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