



Building and Development Tribunals

Queensland Government

Department of **Local Government and Planning**

APPEAL

Integrated Planning Act 1997

File No. 03-05-076

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 against the decision of the Maroochy Shire Council to refuse an application for Building Works – siting variation - on land described as Lot *withheld* and Lot *withheld* and situated at “the subject site”.

Date and Place of Hearing: 8:30am on Wednesday 7th December 2005
at “the subject site”

Tribunal: Mr Chris Schomburgk

Present: *withheld* – agent for the applicants;
withheld – agent for the applicants; and
Mr Steve Tucker – Maroochy Shire Council.

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 conditions**.

Material Considered

The material considered in arriving at this decision comprises:

- The application and supporting plans and documentation;
- Additional material provided by the applicant and the Council at and subsequent to the hearing, including copies of Court judgments and previous development permits over the subject site;
- The relevant provisions of the Town Planning Scheme for Maroochy Shire Council;
- Council’s Decision Notice dated 26th October 2005; and
- The Integrated Planning Act 1997.

Findings of Fact

I make the following findings of fact:

- The site comprises a group titled development known as *withheld*, located at “the subject site”. The site is the subject of a reconfiguration approval to create a new survey plan reference for the site, yet to be registered.
- The subject site has been the subject of a long-running legal dispute with the owner of the adjoining land. This dispute has included, of relevance, a Supreme Court decision that (in effect) an area of land be transferred from the adjoining parcel to be added to the subject land (Unit 4) to account for an encroachment by the swimming pool that is the subject of this appeal.
- Pursuant to that Court decision, an application for reconfiguration has been approved by the Council to affect that transfer of land. The Supreme Court ruled that only the extent of the encroachment was to be transferred. This meant that no additional setback was provided from the pool to the new boundary. The survey plan for that reconfiguration has yet to be sealed by the Council as the reconfiguration approval includes a condition that “*building setbacks and side boundary clearances (are) to comply with the Building Act*”.
- The applicants have then sought approval for a relaxation of the boundary setback for the swimming pool and an enclosure over that pool. As a result of the approved reconfiguration, the new property boundary is coincident with the edge of the pool structure (that is, the setback is nil. Council’s usual requirement is for a setback of 1.5m.
- The swimming pool is “perched” due to the steeply sloping nature of the land. At its western end, the pool is in the ground but at its eastern end is approximately 5 to 6 metres out of the ground. The screened 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.
- I was informed by the Council officer (Mr Tucker) that the lower portions of the enclosure would comply with the pool fencing requirements, while the higher portions are apparently for insect screening only.
- The nature of the topography and the height of the enclosure mean that, from lower parts of the adjoining land, the structure presents as approximately 10m or more in height, and is right on the common boundary of the two properties.
- 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.
- Given the background to the boundary re-alignment (effected by the reconfiguration approval) it is impractical to require the setback to be achieved, as to do so would require removal of the pool. It is the pool that was the subject of the Supreme Court proceedings referred to above.
- The Council has refused the application 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 minimize adverse impacts on the amenity of neighbouring sites with regard to ensuring acceptable:*
 - *natural light and ventilation;*
 - *Views and outlook*
 - *privacy*
- It was agreed on site that “natural light and ventilation” was not an issue in this case, but that “views and outlook” and “privacy” were concerns for the Council, especially for the future residents of the adjoining site when it was developed as anticipated by the Planning Scheme.
- Given the history of this particular pool, including its encroachment onto the adjoining property and the subsequent Court decision, it does not seem reasonable or practical to require the existing pool to be set back further from the newly-created boundary.

Based on my assessment of these facts, it is my decision that **the appeal is upheld. Council's decision** to refuse the Application for Building Works - siting variation - is **set aside** and **the application is approved, subject to conditions.**

Reasons for the Decision

- The swimming pool and structure have been the subject of a Supreme Court ruling that the boundary be re-aligned to coincide with the edge of the pool structure. To now require the swimming pool and screened enclosure structure to be setback from that boundary would make a futility of the Supreme Court decision.
- The location of the swimming pool has the potential to create some overlooking onto lower areas of the adjoining land however this would only be by someone standing on the very edge of the pool. I do not consider that the potential impacts on privacy are a significant problem.
- The enclosure is a substantial structure which, because of its height, exacerbates the visual impact of the pool structure when viewed from the lower parts of adjoining properties. While it is constructed of lightweight mesh material (with a solid frame), it nevertheless has an imposing visual impact when viewed from below. I consider that the potential impacts on views and outlook for future residents of the adjoining land will be significant, but can be mitigated by removing the upper parts of the screened enclosure.

Conditions of approval:

- 1) The screened pool enclosure is to be limited to the existing waist high (approximately) pool fence only. The mesh screen roof and walls above that height are to be removed.
- 2) This approval is for the boundary setback (siting variation) only, and does not authorize building works to occur. Separate building works approval may be required.

Chris Schomburgk
Building and Development Tribunal General Referee
Date: 10th December 2005

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 and Planning
PO Box 15031
CITY EAST QLD 4002
Telephone (07) 3237 0368: Facsimile (07) 32371248