



APPEAL
Integrated Planning Act 1997

File No. 03-04-085

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Maroochy Shire Council
Site Address: 77 Stillwater Drive, Twin Waters.
Applicant:

Nature of Appeal

Appeal under Section 21 of the *Standard Building Regulation 1993* against the decision of the Maroochy Shire Council to refuse an application for a siting concession for a swimming pool already partly constructed on land described as Lot 585 SP 144482, situated at 77 Stillwater Drive, Twin Waters.

Date and Place of Hearing: 10.00am, Monday 13 December 2004
at 77 Stillwater Drive, Twin Waters

Tribunal: Geoff Cornish
Present: Applicant
Property owner
Maroochy Shire Council

Decision

In accordance with Section 4.2.34 [2] of the *Integrated Planning Act 1997*, I hereby confirm the decision of Maroochy Shire Council to refuse an application for a siting variation to enable the construction of a swimming pool within the prescribed side boundary setback on Lot 585 SP 144482, situated at 77 Stillwater Drive, Twin Waters.

Background

The matter concerns a decision by Maroochy Shire Council to refuse to issue a siting concession for a swimming pool to be constructed up to the eastern side boundary of the allotment in lieu of maintaining a 1.5 metre setback from the boundary. The pool shell already exists, construction having been commenced prior to the granting of any siting variation or any Development Permit for building work. Commencement of the work has been undertaken on the understanding, reportedly given to the pool builder by his certifier, that there would be no problem in obtaining the approval of Council to the proposal.

Material Considered

1. Decision Notice issued by Maroochy Shire Council on 2 November 2004 refusing the application for a siting concession.
2. Plan of the allotment together with the proposed layout of the dwelling and the pool.
3. Property owner's letter to Council dated 17 November stating acceptance of the proposed pool location.
4. Building and Development Tribunal Appeal Notice, dated 17 November 2004, appealing the Council's decision.
5. Verbal submissions by the applicant and owner on 13 December 2004 setting out why the appeal should be allowed.
6. Verbal submission by Maroochy Shire Council setting out why Council had not granted a siting concession and why the appeal should not be allowed.
7. *Building Act 1975*.
8. *Standard Building Regulation 1993*.
9. *Queensland Development Code Part 12*
10. *Integrated Planning Act 1997*

Findings of Fact

I made the following findings of fact:

1. The application for a siting variation was made to Council on 1 October 2004.
2. A site inspection was undertaken by Council in relation to that application on 11 October 2004, at which time the shell of the pool had already been poured.
3. The construction of the pool commenced without any formal Development Permit for building work having been issued.
4. The swimming pool is a Class 10b structure that is governed for siting by the provisions of Part 12 of the *Queensland Development Code*, as called up by the *Standard Building Regulation*. These siting provisions have not been superseded by Maroochy Plan 2000.
5. The site has approval for zero lot line construction to the western side boundary and the existing, partly constructed, dwelling has been erected to that alignment. Therefore access to the rear of the property is not possible between the dwelling and the western side boundary. No such reduced setback approval exists in relation to the eastern side boundary.
6. The existing location of the pool is such that access to the rear of the property is not possible between the dwelling and the eastern side boundary and must be achieved through the dwelling.

Reasons for the Decision

After assessing the facts and the submissions of the parties, I have reached the following conclusions:

- Construction of the swimming pool commenced without approval having been granted for its proposed siting.
- Construction of the swimming pool commenced without formal approval having been given by way of the issuing of a Development Approval for building works.
- The siting of the swimming pool, while acceptable to the current owner, nevertheless is not consistent with the intent of the siting provisions of the *Queensland Development Code*

which, except for certain defined structures in specific circumstances, requires a general side boundary setback of 1.5 metres. Swimming pools are not included within the structures defined in the Code as attracting special siting consideration with respect to side boundaries.

- While the swimming pool in its current location does not affect the vacant adjoining property to the east in respect of daylight, ventilation, overshadowing, outlook or visual privacy, it nevertheless does have an effect upon the servicing and maintenance of the dwelling to which it is appurtenant. Servicing of the rear of the property can only reasonably be achieved by access through the dwelling. In addition, while maintenance of the eastern wall of the dwelling is not impossible with the pool in its current location, the siting of the pool could not be said to facilitate the maintenance of this part of the dwelling and will, in effect, make maintenance of at least part of this wall quite difficult.
- The nature of the allotment, being almost rectangular and almost level, gives rise to no special circumstances that suggest that a departure from the standard siting provisions of the Code would be warranted. The siting of the pool is based simply on the desire to have the pool in a particular location, without regard to the siting provisions of the Code. The design of the house and pool has not been undertaken with due regard to the siting provisions and the size and shape of the allotment, resulting in an inappropriate combined design solution. While the rear of the property provides adequate space for a pool of the required dimensions without the need for a siting concession, this is not the location preferred by the property owner with respect to the way in which he wishes to utilise his dwelling. The design has been undertaken simply to place a desired house and pool on an allotment for which they are not really suitable in their current configuration.
- From the statements of the owner and the pool builder, it would appear that appropriate advice was not given to the owner at the stage of initial approval for the construction of the dwelling indicated on the site plan. Also proper advice does not appear to have been given to the applicant (pool builder) by his certifier prior to his making an application to Council for a siting variation for the pool. In my view the owner should have been advised, prior to the approval of the dwelling, that the desired combination of the pool and the dwelling would require the obtaining of a siting variation. Accordingly the owner should have been advised to obtain that approval before the certifier approved construction of a dwelling that might not be able to have a pool sited and utilised as proposed on the site plan. Such an eventuality could have lead to the redesign of the dwelling and pool prior to commencement of construction. Whether, in fact, the correct advice was given at the appropriate time and ignored is not known.
- It is my view that the standard siting provisions exist for a regulatory purpose and should not simply be varied to suit persons who do not wish their buildings or structures to comply. If all that is required to achieve a siting variation is to request one, the standard siting provisions of the Code become irrelevant. There should be some unusual aspect to the site that would justify a departure from the standard provisions before such a departure should be permitted. No such aspect exists in this instance and a variation should not be granted on the basis of the structure already existing without the necessary prior approval. The only justification given for having the pool in the proposed location was that this was the way in which the owners wished to utilise the combination of the dwelling and the pool.

G.S.Cornish
Building and Development
Tribunal Referee
Date: 21 December 2004

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
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