



APPEAL
Integrated Planning Act 1997

File No. 3-02-039

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Noosa Shire Council
Site Address: 34 Lowry Street, Peregian Beach

Nature of Appeal

Appeal under section 21 of the Standard Building Regulation 1993 against the decision of the Noosa Shire Council not to grant approval for the siting of retaining walls/fences on land described as Lot 388 on Plan P93154 and situated at 34 Lowry Street, Peregian Beach.

Date and Place of Hearing: 10.30am on Thursday 31 October 2002.
At the office of the Department of Local Government and Planning,
Level 25, Mineral House, 41 George Street, Brisbane.

Tribunal: Gregory Schonfelder

Present: Zane Russell, Suncoast Building Approvals for the applicant
Owner of the land
Colin Williams, Noosa Shire Council

Decision

I determine that the decision of the Noosa Shire Council in their letter dated 5 September 2002 refusing the application by Suncoast Building Approvals for a variation to the standard siting requirements of Part 3 of the Standard Building Regulation 1993 for the as constructed retaining walls/fences is **set aside** and approval is granted for-

- (i) the existing wall and fencing which exceeds 2.0m in height, constructed within 6.0m of the front setback to remain; and
- (ii) the existing wall and fencing which exceeds 2.0m in height, constructed along the south boundary of the allotment to remain;

Subject to:

The existing development permit for building work being amended to include this assessable development or a new approval is sought for this building work.

Background

The applicant's representative explained the basis for the original application to the Council for a variation for siting of the retaining walls/fences and the subsequent appeal against Council's decision:-

- The builder considered only the front area needed a siting variation and not the side boundary.
- The building certifier conducted the frame inspection on 12 April 2002.
- The soil test report by Soil Test Australia notes that the site is cleared, flat and contains fill.
- The elevations of the dwelling on the approved drawing drafted by Des Crawford show the site as flat.
- No contours were shown on the site plan.
- The builder realised the walls were over 1.0m in height.
- The building certifier advised the builder that an application for siting variation was required by letter on 22 February 2002 after an inspection was conducted on 15 & 16 February.

With regard to Noosa Shire Council's letter of refusal, the applicant's representative contends that:-

1. The proposal does not interfere with the privacy of an adjoining allotment because a letter has been received from that owner offering no objection to the proposal.
2. The proposal does not restrict the areas of the allotment suitable for landscaping because the site coverage is only 39%.
3. The proposal does not obstruct access for normal building maintenance because it is a masonry wall, which has been rendered and will only require minimum maintenance.
4. This proposal is not a precedent, as each case needs to be determined on its own merit.
5. The proposal may have been constructed unlawfully and prior to Council consent but no enforcement action has been taken by the Council.
6. The proposal does not need to comply with the policy for landscaping as stated and is not applicable.
7. The vegetation mentioned in this clause should relate to the adjoining property.
8. The last dot point is not a matter which is called up by the Standard Building Regulation 1993.

The Council's representative in their response stated:-

- They have attended 2 meetings on site in February in response to the excavation on the north side of the allotment.
- The application for a siting variation was posted on 26 July 2002.
- The application was not clear in what was being applied for.
- The application was made after building work had started and was near complete.
- There was Councillor input to the decision.
- The applicant is relying on precedents set in the area.
- The plans approved as part of the building approval lack detail.
- Drawing 1070, sheet 1-A shows 1.8m high retaining walls to three boundaries that were not addressed by the building certifier.
- The building certifier was aware after their site inspections of 15, 16 & 21 February 2002 that an application for siting variation and a Development Approval was required for these structures.
- No action was taken by the building certifier other than a letter.

- The frame inspection conducted in April 2002 also gave the opportunity to require the builder to comply with the legislation.
- Just because the adjoining neighbour may have given their approval for the already constructed wall Council must take into account the public interest and the interests of future property owners.

Material Considered

1. Copy of page one of a Soil Test and Foundation Report by Soil Test Australia, project job number 46531-S, dated 12 December 2001, which also formed part of the Building Approval Number 020065.
2. Copy of drawings number 1070, sheets 1, 1A, 2, 3 & 4 drawn by D Crawford from Residential Design Studio which formed the endorsed plans of the Building Approval Number 020065, dated 5 February 2002 issued by Suncoast Building Approvals.
3. Copy of a letter from Zane Russell from Suncoast Building Approvals dated 22 February 2002 to the builder of the works advising that in relation to the site inspections carried out by Suncoast Building Approvals of the property on 15, 16 & 21 February 2002 that:
 - An application for siting variation is required to be made to the Noosa Shire Council for the retaining walls/fences.
 - Amended plans are required to be provided by the Engineer.
 - Shoring of excavation on the other property boundary to the wall is required.
4. Copy of Noosa Shire Council's Building Services Manager's report to Council dated 29 August 2002 of the decision by delegation to refuse the application for siting variation for the retaining walls/fences on the subject property.
5. Copy of Noosa Shire Council's decision dated 5 September 2002, which refuses the application for siting variation in respect of retaining walls/fences on the subject property.
6. Copy of the applicant's notice to appeal the decision of Noosa Shire Council dated 3 October 2002.
7. Undated statement from Zane Russell from Suncoast Building Approvals, which addresses the items in the Noosa Shire Council's letter, dated 3 October 2002 refusing the application for a siting variation. Also included was:
 - Amended drawing 1070, sheet 5 with wall/fence heights annotated.
 - 11 Photos, UBD descriptions and details of precedents within the immediate vicinity of walls/fences over 2.0 metres above natural ground.
 - Noosa Shire Council's planning scheme extract pertaining to landscaping.
8. Copy of a letter from the adjoining property owner (south side) adjacent to the retaining wall/fence dated 9 October 2002, stating no objection to the existing masonry wall between his property and the subject property.

9. Letter from John Hill, Suncoast Building Approvals dated 11 October 2002 to the Registrar, Building and Development Tribunal, on behalf of the applicant outlining the company's position in regard to the events and the basis for the appeal.
10. Copy of a memo from Councillor Vivien Griffin from Noosa Shire Council dated 29 October 2002 to the Shire's Building Services Manager endorsing his decision to refuse the application for a siting variation for retaining walls/fences at the subject property.
11. Letter from Zane Russell from Suncoast Building Approvals dated 8 November 2002 providing to the Tribunal additional information requested during the initial hearing. This included:
 - Amended drawing 1070 sheet 5 showing the retaining walls/fences in elevation with the height above natural ground annotated on the drawing. Ten additional photographs of the site showing the retaining walls/fences in relation to the streetscape, neighbouring properties and the heights above natural ground.
 - Copy of a previous application for a siting variation for retaining walls/fences approved by the Noosa Shire Council for another property at Sunshine Beach.
12. Letter from Clay Anderson, Building Services Manager, Noosa Shire Council dated 29 November 2002 to the Registrar, Building and Development Tribunal in response to the additional information requested. This included:
 - Detailing the difference between the application which was previously approved and this application refused by the Council.
 - Response to the Zane Russell's statements presented to the hearing which point by point addresses the Noosa Shire Council's basis for refusing the application for siting variation.
 - Proposed enforcement action to be undertaken by the Noosa Shire Council with regard to breaches of the Standard Building Regulation 1993.
13. The Standard Building Regulation 1993
14. The Integrated Planning Act 1997

Findings of Fact

I made the following findings of fact:

1. The retaining walls/fences facing the street are constructed within the road boundary clearances prescribed under Part 3 – Siting Requirements, Section 38 of the SBR and are not in accordance with the approved plans.
2. The retaining walls/fences along the south boundary of the allotment are constructed within the side boundary clearances prescribed under Part 3 – Siting Requirements, Section 38 of the SBR and are not in accordance with the approved plans.
3. Both these structures require an application for a siting variation being made to the Local Government.
4. Both these structures need a Development Permit for building work and the existing approval needs to be amended and a new approval applied for these structures.

5. No enforcement action has been undertaken against the builder or the owner for illegal building work by the building certifier or the local government.

6. Under section 48 of the SBR, a local government may vary how division 2 applies to the application after considering under section 48.(3), the following points-

(a) *The levels, depth, shape or conditions of the allotment and adjoining allotments.*

The allotment has a cross fall of approximately 1.8m from north to south and 1.8m from east to west and this is similar to the adjoining allotment on that side of the street.

(b) *The nature of any proposed building or structure on the allotment.*

A single storied dwelling has been constructed on the site and retaining walls erected to provide level access to private open space.

(c) *The nature of any existing or proposed buildings or structures on the adjoining allotments.*

According to the photographs provided, the adjacent dwelling is a single storied timber clad building set at an angle to the side boundary with the greater setback towards the street. This is the area where the retaining wall/fence is at its highest.

(d) *Whether the allotment is a corner allotment.*

The allotment is not a corner allotment.

(e) *Whether the allotment has 2 road frontages.*

The allotment has only one (1) road frontage.

(f) *Any other matter considered relevant.*

There are no other relevant matters to consider.

7. In varying the siting requirements, the local government must be satisfied that the building or structure, built on the allotment in the way proposed, would not **unduly-**

(a) *Obstruct the natural light or ventilation of the adjoining allotment.*

The existing adjacent dwelling and outbuilding on the adjacent allotment are set back from the allotment boundary at a distance, which would allow for adequate natural light and ventilation to this allotment.

(b) *Interfere with the privacy of the adjoining owner.*

The part of the wall within the prescribed boundary clearance would not interfere with the privacy of the adjoining owner. The structure provides a privacy screen on the subject property and the area adjacent would have minimal use because of the landscaping provided.

(c) *Restrict the areas of the allotment suitable for landscaping.*

Approval of the application for a variation to the siting would not restrict the areas of the allotment suitable for landscaping. When the landscaping matures the walls/fences will be hidden from the street.

(d) Obstruct the outlook from the adjoining property.

The wall does not unduly obstruct the outlook from the adjoining property. There is some obstruction but as the adjoining property has been cut, this additional height of the wall/fences is not considered excessive.

(e) Overcrowd the allotment.

The house is within the allowable site coverage and the timber fence panels diminish any visual effect of over crowding.

(f) Restrict off street parking for the allotment.

The walls will not affect off-street parking.

(g) Obstruct access for normal building maintenance.

The walls will not affect access for normal building maintenance. The wall is cement rendered and can be painted.

Reasons for the Decision

An assessment of section 48.(3) and (4) of the SBR indicate that, subject to the conditions imposed, the siting requirements under section 2 of the SBR may be varied.

Enforcement action should have been instigated by the building certifier or failing that by the Council when this breach of the regulation was first brought to their attention.

The as constructed walls/fences do not unduly impact on the streetscape or adjoining properties.

Appropriate landscaping can subdue the effect of the height of the structures and the front setback encroachment is considered only minor. The setback from the south boundary is exacerbated by the extensive cut provided for that dwelling.

Gregory Schonfelder
Building and Development
Tribunal Referee
Date: 10 January 2003

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 31
BRISBANE ALBERT STREET QLD 4002
Telephone (07) 3237 0403: Facsimile (07) 32371248