



**APPEAL**

**File No. 3-01-028**

*Integrated Planning Act 1997*

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

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**Assessment Manager:** Maroochy Shire Council

**Site Address:** 2 Godfrey Avenue, Bli Bli.

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### **Nature of Appeal**

An application dated 19.12.2000 was made by Building Planning and Drafting Service on behalf of the applicant to Maroochy Shire Council to vary the siting requirements of the Standard Building Regulation 1993. Subsequently on 23.1.2001 the applicants provided further information in support of their application. Maroochy Shire Council deemed the application to be an Application for Preliminary Approval of Building Works and issued a Decision Notice refusing the variation on 18.4.2001. The applicant then lodged an appeal against that decision under Section 4.2.9 of the Integrated Planning Act 1997 on 15.5.2001.

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**Date and Place of Hearing:** The hearing commenced on site at 2 Godfrey Avenue and was then reconvened at 12 Waterview Crescent, Bli Bli

**Tribunal:** Alan Arthur Finney

**Present:** Steve Tucker representing Maroochy Shire Council  
Applicants

### **Decision**

That the decision of the Maroochy Shire Council refusing the application to vary the siting requirements of the Standard Building Regulation 1993 be **changed** by allowing the building to be sited on the boundary subject to the submission of amended proposal drawings showing:

- The south-western wall of the proposed building sited so that it aligns with the south-western alignment of the adjacent dwelling; and
- For a distance of 5 metres from the south-western wall, the wall facing the side boundary is to achieve a minimum setback of 1.5 metres; and
- The wall on the boundary is to be of masonry construction with a textured finish; and
- The maximum height of the wall on the boundary is to be 3.5 metres above natural ground level.

## Material Considered

### Documents.

- Plan Numbers 001107070/A3 Sheets 1 to 4 inclusive drawn by BP&DS.
- Letter from BP&DS dated 7.11.2000.
- Form 1, Part A IDAS details dated 19.12.2000.
- Form 1, Part E IDAS details undated.
- Maroochy Shire Council tax invoice for fees dated 27.12.2000.
- Copy of Sealed Plan No 805217.
- Undated Specialist Assessment Sheet (Building) Maroochy Shire Council.
- Information request from Maroochy Shire Council dated 17.1.2001.
- Letter from BP&DS dated 23.1.2001.
- Submission by K and J Johnston dated 4.1.2001.
- Specialist Assessment Sheets Building/Planning Maroochy Shire Council dated 18.4.2001.
- Decision Notice from Maroochy Shire Council dated 18.4.2001.
- Facsimile dated 14.5.2001 from the applicant to Steve Tucker.
- Internal memo to Steve Tucker from Strategic Planning Services, Maroochy Shire Council dated 26.6.2001.
- Submission by adjoining neighbours dated 4.5.2001.
- Form 10 Building and Development Tribunal Appeal Notice dated 2.5.2001-received 15.5.2001.

Verbal submissions made by all parties to the appeal.

## Findings of Fact

- The applicant sought to gain approval to construct a Class 10a building with a zero boundary clearance along the South Western boundary for a distance of 20 metres. This is in conflict with the provisions of s38 and more particularly the concessions available for Class 10a buildings under s41(c) of the Standard Building Regulation 1993.
- The Maroochy Shire Council has treated the application made on Form E (Planning Scheme Works) as an application to vary the siting requirements of the Standard Building Regulation 1993.
- The Maroochy Shire Council refused the application by decision dated 18.4.2001. The reasons for refusal were cited as:
  1. An alternative location exists on the site to accommodate the proposal.
  2. No planning grounds exist to justify a variation of the Scheme's setback provisions.
  3. Light and ventilation will be adversely affected in the adjoining building.
  4. The proposal will have an adverse impact on the outlook from adjoining dwellings.
  5. The proposal is incompatible with the street amenity (character).
  6. The proposal is not necessary or expedient.
  7. The proposal will have an adverse impact on privacy (noise).
  8. Building massing and scale is not in keeping with the desired character of the area.
- The owner is entitled to appeal to this Tribunal pursuant to s.4.2.9(1) of the Integrated Planning Act 1997 in respect of a local government's decision regarding variation of boundary clearances under s48 of the Standard Building Regulation 1993.
- The Tribunal appears to have jurisdiction to determine the appeal but only in respect to

matters relating to the Building Act 1975 and specifically to s48 of the Standard Building Regulation 1993. The hearing and determination of this appeal is therefore limited to matters contained within the Building Act 1975.

- The neighbours have indicated they are generally in agreement with the proposal.

## **Reasons for the Decision**

There are several issues for this Tribunal to consider. They are as follows and my reasoning is shown there under:

### **1. Was it within Council's power to refuse the application for siting variation?**

Part 3, Division 2 s38(a) of the Standard Building Regulation 1993 (SBR) states:

#### ***Side and Rear Boundary clearances generally***

38. *If the maximum height of the outermost projection above the natural ground surface is –*

- (a) 4.5 m or less, the side and rear boundary clearances must be not less than 1.5 m; or*
- (b) ....*

Both the appellant and the respondent agreed at the hearing that the maximum height of the structure on the boundary would not exceed 3 m. The drawings included with the application show a scaled height of approximately 3.4 m. It is therefore clear that a side boundary clearance of 1.5 m is required to comply with the requirements of the SBR. Section 41 allows a general discretion to Class 10a buildings subject to the proviso that:

- (c) the total length of all elevations of all buildings facing and within the boundary clearance to any 1 boundary does not exceed 9 m; and*

In this particular application the length of the building is proposed to be 20 m. Clearly this exceeds the limits of the legislation, including the concessions provided. The respondent concedes that the building is a Class 10a and the appellant has indicated that the building is to be used for domestic purposes namely, the construction of a hobby aircraft, and storage of personal belongings, including watercraft.

The boundary is however an issue that needs to be clarified. This particular property has a lot configuration, which includes an unusual change in direction on the eastern aspect. The respondent has indicated that they would consider that the maximum length of 9 m would include all buildings within 1.5 m facing this aspect. By taking this view then the intrusion of an existing shed would also be included. The extent of such intrusion has not been quantified, but presumably this would mean some length less than 9 m would thus be compliant. I do not share this view, I am of the opinion that the side boundary in this instance is limited to the boundary on bearing 13<sup>0</sup> 19'.

Division 3 s48 of the SBR allows the respondent local government the power to vary the siting provisions of Division 2 should an applicant seek to do so. It is clear therefore that it is within the Council's power to either approve or refuse siting variation requests.

### **2. Was the decision of Council based upon relevant considerations?**

When considering applications to vary the siting requirements of Division 2 of the SBR, Division 3 s48 states:

*(3) The local government must consider the following –*

- (a) *the levels, depth, shape or conditions of the allotment and adjoining allotments;*
- (b) *the nature of any proposed building or structure on the allotment;*
- (c) *the nature of any existing or proposed buildings or structures on adjoining allotments;*
- (d) *whether the allotment is a corner allotment;*
- (e) *whether the allotment has two road frontages;*
- (f) *any other matter it considers relevant.*

At the hearing the officer representing the respondent indicated that:

- The allotment is of a flat, deep configuration, 2759 m<sup>2</sup> in area. The shape is regular apart from the area containing an existing shed at the front.
- There is a large dwelling under construction and this proposal is for a large shed.
- The adjacent building is a two storey dwelling approximately 2 metres from the boundary with windows to habitable rooms facing the boundary.
- The allotment has a single road frontage.
- No other matters were considered relevant.

Since the opportunity existed to design the shed within the provisions of Division 2 no grounds exist to assess against subsection (4). Accordingly the application was refused. Documents provided by the respondent also indicated that the application had been assessed by a number of officers and that assessment of the application had been comprehensive, and had included all matters in division 3 s48 of the SBR.

The conclusion I have reached is that Council has reached a decision based upon all relevant considerations.

### **3. Was the decision of Council justifiable and reasonable?**

Many reasons were advanced by the appellant, both at the hearing and within his grounds of appeal, which would appear sound. The neighbour has also provided advice to the effect that they support the application in its current form, and have indicated that they are happier with the rendered and textured besser block wall than the earlier approval. They have also indicated that they believe the building length of 20 metres on the boundary as opposed to 25 metres at 1.5 metre distance is preferable. These submissions are not without substance. Section 48 Part 4 of the SBR lists those matters which must also be not "unduly" affected by the proposal.

- (a) obstruct the natural light or ventilation of an adjoining allotment; or

I do not agree with the respondent Council stating that there would be an appreciable impact on light and ventilation. The appellant gave an indication at the hearing that the maximum height of the structure on the boundary would be 2.6 metres, however the building plans scale to approximately 3.4 metres and show a flat site. Unfortunately there will be some retention of the imported fill necessary. The effect of this, I believe, will be a height, based on the proposal drawings of closer to 4 metres. Because of the size of the building it would be preferable to limit the height to a maximum of 3.5 metres above natural ground level.

- (b) interfere with the privacy of an adjoining allotment; or

I also have some reticence in accepting that there is an adverse impact on privacy. I think that the appellant has attempted to appease, as much as possible such impacts, by masonry construction, tree protection, height, and agreeing to limit the front to align with the adjacent house front. There is currently minimal impact on habitable rooms of the adjoining property,

since such rooms are upstairs. There is the potential for some adverse impact on the waterfront of the lower rooms of the adjoining property. These rooms could in the future be converted to living areas to enjoy the amenity of the area. It is on this basis that I would amend the proposal to protect such amenity, for approximately 5 metres, by requiring compliance with the setback requirements of the SBR ie 1.5 metres from the boundary.

- (c) Restrict the areas of the allotment suitable for landscaping; or

The allotment is of a sufficiently large size that this should not be an issue at any time.

- (d) Obstruct the outlook from adjoining allotments; or

The appellant has provided advice that he will site the proposal so that it would align with the current waterfrontage alignment of the adjacent dwelling. This is reinforced within this decision. This combined with a requirement to maintain a 1.5 metre setback from that frontage for a distance of 5 metres should ensure that the outlook from the neighbouring allotment will not be unduly affected. This should also address some of the bulk and size of the proposal, by providing some articulative relief for the adjoining property outlook.

- (e) Overcrowd the allotment; or

The allotment is of a sufficiently large size that this should not be an issue at any time.

- (f) Restrict off-street parking for the allotment; or

The allotment is of a sufficiently large size that this should not be an issue at any time.

- (g) Obstruct access for normal building maintenance.

The type of building proposed should require minimal maintenance, which with some neighbourly cooperation should be achievable.

Whilst the Council decision was not **manifestly** unreasonable or unjustifiable, this Tribunal is afforded the opportunity to review the decision de novo. In reviewing the decision, I find the building could in fact have been carefully designed within many of the constraints of the current legislation to achieve much of what the appellant and Council sought to achieve. Accordingly I find that the Council decision should be varied to achieve the outcomes detailed above.

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**ALAN ARTHUR FINNEY**  
**Building and Development**  
**Tribunal Referee**  
**Date: 27.11.01**

## **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  
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