



APPEAL
Integrated Planning Act 1997

File No. 3-02-052

BUILDING AND DEVELOPMENT TRIBUNAL - DECISION

Assessment Manager: Townsville City Council

Site Address: 13 Grace Street, Nelly Bay, Magnetic Island.

Nature of Appeal

Appeal against the decision of the Townsville City Council to refuse an application for the proposed erection of a fence/screen on land described as Lot 59 on RP No 707525 and situated at 13 Grace Street, Nelly Bay, Magnetic Island.

Date and Place of Hearing: 1.00 pm on Wednesday 5th February, 2003.
at 13 Grace Street, Nelly Bay, Magnetic Island.

Tribunal: Nigel Rees Daniels.

Present: Appellant.
Peter Gopal, Townsville City Council.
Joanne Pendergast, Townsville City Council.
Kath McClusky, Townsville City Council.

Decision

Under the provisions of Section 4.2.34 (2) of the Integrated Planning Act 1997, the Tribunal's decision is to set aside the decision appealed against and make a decision replacing the decision set aside, as follows:

The decision set aside is that of the Townsville City Council, made at its Development Assessment meeting on 19 November 2002, and as advised to the appellants in its letter reference 3815017 BG02/0273, dated 21 November 2002.

The decision made to replace the decision set aside, is as follows:

Under the provisions of Section 48 of the Standard Building Regulation 1993, how Division 2 of the

Standard Building Regulation 1993 applies to the application to construct a fence on or near the common boundary between the properties at 13 Grace Street and 8 Dorothy Street, Nelly Bay, magnetic island, is varied, in Section 42, to allow that the fence may have a height of up to 2.4 metres above natural ground level.

Background

The owners of the property at 13 Grace Street, Nelly Bay made application to the Townsville City Council for approval to construct a “noise protection” fence on or near the common boundary with the adjacent property at 8 Dorothy Street. The fence material is described as “Hebel panel” and would have a height of 2.4 metres to 3.6 metres; the increase in height being caused by the slope of the land, the top of the fence being level.

The applicants cited a range of noise and other nuisance as reasons for requiring the noise protection fence.

The Townsville City Council refused the application but, in doing so, advised the applicants that it is prepared to approve a fence having a height of 2.4 metres.

The Council’s letter advising the applicants of its decision stated that its decision was made under the provisions of Section 48 of the Standard Building Regulation 1993 and gave a number of reasons, each of which related to either aesthetics or amenity.

Material Considered

- The letter of application;
- Drawings accompanying the application;
- Council’s letter advising of its decision;
- Appellants’ written submission to the Tribunal;
- Photographs of the intended location of the fence, forming part of the appellants’ submission;
- Verbal submissions made at the hearing, by both parties;
- Information gained from inspection of the site.

Findings of Fact

The fence, at the requested height of 2.4 metres to 3.6 metres, is likely to obstruct “line of sight” noise transmission from the neighbouring property.

A fence of not more than 2.4 metres height is likely to obstruct “line of sight” noise transmission from the lower areas of the neighbouring property; but will not obstruct “line of sight” noise transmission from the upper verandah area of the dwelling on the neighbouring property.

A fence of height greater than 2.4 metres will be in extreme conflict with the character of the building’s neighbourhood.

A fence of height greater than 2.4 metres will obstruct breezes, unduly.

A fence of height greater than 2.4 metres will obstruct the outlook from the property at 8 Dorothy

Street, unduly.

There are means, other than a fence, available to ameliorate noise nuisance from the neighbouring property.

Reasons for the Decision

After consideration of the appellants' submission, the Tribunal accepts, on the balance of probability, that noise nuisance exists. The existence of noise nuisance was not disputed by the Council.

It is reasonable to grant the owners of 13 Grace Street approvals for construction work which will contribute to lessening the nuisance, such as fence greater than 2 metres in height.

However, construction intended to mitigate the nuisance should not, in its turn, be in conflict with the character of the structure's neighbourhood; nor cause any extremely adverse effect on the amenity of the area.

A fence having a height of 2.4 metres will obstruct "line of sight" noise transmission for most of noise sources on the neighbouring property. However, a fence higher than 2.4 metres will be in extreme conflict with the character of the building's neighbourhood; because such a fence height is outside the range of fence heights encountered in the neighbourhood. A fence greater than 2.4 metres will also obstruct breezes and will obstruct the outlook from the verandah of the adjacent dwelling.

For those noises which emanate from the upper level of the adjacent dwelling, other noise barriers may be provided, which have no adverse effect, or minimal effect, on either amenity or aesthetics. Those noise barriers can include, for example, a spandrel panel in the line of the verandah columns and below the eaves of the house at 13 Grace Street, or provision of double glazing or other sound protective measures to selected doors and windows of the dwelling.

Notes:

The Council made its decision under the provisions of Section 48 of the Standard Building Regulation 1993. The reasons for the decision related to amenity and aesthetics. The Tribunal considered whether or not the decision should have been made under Division 4 of the Standard Building Regulation 1993 and therefore the appeal heard by an amenity and aesthetics tribunal. The Tribunal formed the opinion that the decision was correctly made and that the Tribunal is competent to decide the appeal, for the reason that Division 4 – Amenity and Aesthetics, of the Standard Building Regulation 1993, applies to "single detached class 1 buildings or class 10a buildings, forms of buildings and localities" and, consequently, does not apply to structures that are not dwellings.

**Nigel Daniels, Dip Arch, Reg Arch, MAIBS,
Building and Development Tribunal Referee
Date: 25th February 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
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