



Building and Development Tribunals – Decision

Integrated Planning Act 1997

Appeal Number: 3–09–054

Applicant / Appellant: Dustin and Michelle Lynch

Assessment Manager / Respondent: Toowoomba Regional Council (Certification section)

Concurrence Agency / Co-Respondent: Toowoomba Regional Council (Compliance section)

Site Address: 11 South Street, Rangeville, Toowoomba and described as Lot 12 on RP908418, Parish of Flagstone – the subject site

Appeal

Appeal under section 4.2.9 (1) of the *Integrated Planning Act 1997* (IPA) against the decision of the assessment manager (Toowoomba Regional Council - certification section) dated 15 June 2009 to refuse a development application.

The refusal is at the direction of the concurrence agency (Toowoomba Regional Council - compliance section) for not being in accordance with the acceptable solutions of the performance criteria of Part 1 of the Queensland Development Code (QDC), principally:-

- The location and height of the retaining walls and fences will comprise the reasonable visual amenity expectations of the adjoining residents.
 - The bulk and height of the structures will adversely affect the outlook and views of neighbouring residents.
 - The bulk and height of the structures will create an unacceptable visual impact on the streetscape.
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Date of hearing: 11:00am, Tuesday 4 August 2009

Place of hearing: The subject site

Tribunal: Mr Leo Blumkie – Chairperson

Present: Mr Dunstin Lynch – Applicant / appellant
Mrs Michelle Lynch – Applicant / appellant
Mr Bob Orr - Toowoomba Regional Council (compliance section)
Mr Robert Sternberg - Toowoomba Regional Council (certification section)
Mr Mark Sorensen – Builder
Ms Annelie Kuehnemann - Observer (Toowoomba Regional Council)
Mr Leo Blumkie – Tribunal Chairperson

Decision:

The Tribunal, in accordance with section 4.2.34 (2) (b) of the *Integrated Planning Act 1997* (IPA), **changes** the decision of the Toowoomba Regional Council (certification section) based on the concurrence agency response for a siting variation by the Toowoomba Regional Council (compliance section) and **approves** the siting variation subject to the following conditions:-

- The first two rendered block piers and two open panels on the right-hand side of the front fence, when viewed from the street, are to be lowered by 200mm. The top of the side boundary return section of the above corner pier is to be cut 45 degrees at the top from the existing height to the new lowered height.
- The two open panels on the side boundary extending from the pool barrier towards the front of the property are to be removed. A new complying barrier is to be located a minimum of 1500mm setback from the side boundary and extending from the pool barrier to the edge of the rock wall i.e. approximately 3 metres. The area between the new barrier and the side boundary is either to be lowered by 900mm or be suitably landscaped so as to require minimum maintenance (for safety reasons).
- The solid pool fence barrier on the side boundary from the water feature extending to the glass panel to the front of the property is to be removed and be replaced with a complying glass panel to match the existing glass panels.
- The above alterations to be completed within 4 weeks of the date of this determination unless otherwise extended by the local authority before the expiry date. Any extension of time must be requested in writing before the expiry date.

Background

The site is one of three lots in a small subdivision approved by Council circa 1997. All lots have substantial fall from the rear alignment to the street. Prior to the subdivision approval, the subject site appears to have been cut and/or filled to enable the construction of a tennis court.

The subject site is 1096m² in area and is currently developed with a class 1 building, swimming pool, fencing and retaining walls.

In February 2008 a development permit was granted for a material change of use (MCU) for the subject property.

The assessment manager's conditions, under items 3 and 17 of the permit, made specific reference to what was included in the permit and what further separate approvals would be required prior to construction.

Only the house was included in the permit. No application has been made for the pool and retaining walls.

The house, pool and retaining walls have been constructed.

In April 2008 a development application was made for the swimming pool, retaining walls and fencing.

Following information requests dated 28 January 2009 and further consideration, the application was refused by the assessment manager on the 15 June 2009.

An appeal was lodged with the Registrar on 1 July 2009.

On the 31 July 2009 the acting Registrar advised the appellant and assessment manager in writing that a Tribunal had been established to consider the appeal.

On the 31 July 2009 the Tribunal advised the appellant, assessment manager and concurrence agency in

writing, of the time, date and location for the hearing.

After discussion on the additional documents requested, it was agreed that a detailed section to scale of the side boundary showing existing ground lines and heights of fences and retaining walls would be prepared for presentation at the hearing.

Material Considered

The material considered in arriving at this decision comprises:

1. Development application refusal from the Toowoomba Regional Council (certification section) dated 15 June 2009.
2. Concurrence agency response Toowoomba Regional Council (compliance section) dated 2 December 2008.
3. 'Form 10 – Appeal Notice' and attached documents received by the Registrar on 1 July 2009.
4. Detail section at boundary line presented at the hearing.
5. Verbal submissions from the applicants at the hearing.
6. Verbal submissions from the Council representatives.
7. Verbal submissions from the builder.
8. The *Building Act 1975*.
9. The *Building Regulation 2006*.
10. The IPA.

Findings of Fact

The Tribunal makes the following findings of fact:

- The development permit for a MCU under:-
 - item 3 "Scope of Approval" was for the house only and *"did not imply approval for any other structures indicated on the approved plan....."*
 - Item 17 "Earthworks/retaining Walls - 17.2 *"All proposed retaining walls that exceed 1.0m maximum height specified in the development works Code will require separate Building works approval prior to construction"*.
- The swimming pool was not included as part of the house approval.
- A number of retaining walls/fences exceed 1 metre in height.
- No approval had been obtained for the pool, retaining walls and fencing as required by the MCU.
- Portions of retaining walls and fencing exceed the 2 metre height permitted under acceptable solutions for lots above 450m² in area under Part 12 of the QDC.
- Written advice from the current owners on the eastern side states that they have no objection to the existing structures on the subject property.
- Both parties agreed the natural ground line for portions of the eastern side boundary was up to 1 metre above the existing ground line. The natural ground line agreed to, was marked in red on the 1:100 section and submitted at the hearing.

Reasons for the Decision

1. The Tribunal agrees "*The location and height of the retaining walls and fences will comprise the reasonable visual amenity expectations of the adjoining residents.*"

The extent of fencing exceeding 2 metres in height on the eastern boundary can be reduced by removing the 2 open panels above the retaining wall adjacent to the pool fencing and providing a complying barrier with a minimum 1500mm setback from the side boundary. It is acknowledged it will be necessary to provide low maintenance landscaping to the area of the 1500mm setback (for safety reasons) or lower the landscaping by 900mm so the retaining wall provides a safety barrier.

2. The Tribunal agrees "*The bulk and height of the structures will adversely affect the outlook and views of neighbouring residents.*"

The bulk of the retaining wall and pool barrier to the eastern boundary, exceeding 2 metres in height, can be reduced by removing the solid section from the water feature to the existing glass panel and replacing it with a glass panel to match the existing glass panels.

3. The Tribunal agrees "*The bulk and height of the structures will create an unacceptable visual impact on the streetscape.*"

Lowering the two open panels and two solid piers on the eastern end of the front fence by 200mm will marginally reduce the impact on the streetscape. The top of the corner pier to the side boundary can be cut at 45 degrees to allow for the difference in height. The fence remaining to the front boundary will still maintain a 900mm safety barrier for persons using the front raised portion of the site.

After consideration of the various options available and discussion of the advantages and disadvantages of each, both parties agreed at the hearing, that, with the above proposed modifications, the development would satisfy the performance criteria of Part 12 of the QDC.

As the retaining walls and barriers are already constructed, it would be reasonable to allow the applicant 4 weeks from the date of this determination to complete the modifications to the existing barriers.

NOTE

No other matters in relation to the house, pool, fences/barriers and retaining walls (with regard to compliance) were considered as part of this appeal.

Leo Blumkie
Building and Development Tribunal Chair
Date: 19 August 2009

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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Department of Infrastructure and Planning
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